(18)

No. 01-1269-CFX Title: City of Cuyahoga Falls, Ohio, et al., Petitioners
v.
Buckeye Community Hope Foundation, et al.

Docketed: March 4, 2002 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Feb 26 2002	Petition for writ of certiorari filed. (Response due April 3, 2002)
	Apr 3 2002	Brief of respondents Buckeye Community Hope Foundation, et al. in opposition filed.
	Apr 11 2002	Reply brief of petitioners City of Cuyahoga Falls, et al. filed.
	Apr 16 2002	DISTRIBUTED for Conference of May 9, 2002
	May 9 2002	Record requested.
	May 17 2002	Record filed.
	May 21 2002	REDISTRIBUTED for Conference of June 6, 2002
	May 22 2002	Record filed.
	Jun 4 2002	Supplemental brief of petitioners filed.
	Jun 10 2002	REDISTRIBUTED for Conference of June 13, 2002
	Jun 17 2002	REDISTRIBUTED for Conference of June 20, 2002
	Jun 24 2002	Petition GRANTED. limited to Questions 1, 2 and 3 presented by the petition. SET FOR ARGUMENT January 21, 2003. **********
	Jul 24 2002	Order extending time to file petitioners' brief on the merits to and including August 30, 2002.
	Aug 26 2002	Order further extending time to file the joint appendix and petitioners' brief on the merits to and including September 6, 2002.
	Aug 26 2002	Brief amici curiae of Pacific Legal Foundation, et al. filed.
	Aug 30 2002	Brief amici curiae of City of Athens Ohio, et al. filed.
	Sep 6 2002	Brief amicus curiae of United States filed.
	Sep 6 2002	Joint appendix filed.
	Sep 6 2002	Brief of petitioners Cuyahoga Falls, Ohio, et al. filed.
	Sep 6 2002	Brief amici curiae of International Municipal Lawyers Assn.and City of Garland,TX filed.
	Sep 17 2002	Order extending time to file respondent's brief on the merits to and including October 30, 2002.
	Oct 18 2002	Order extending time to file respondent's brief on the merits to and including November 20, 2002.
	Nov 15 2002	Brief amicus curiae of National Association of Home Builders filed.
	Nov 20 2002	Brief amici curiae of National MultiHousing Council, et al. filed.
	Nov 20 2002	Motion of American Planning Association for leave to file a brief as amicus curiae filed.
	Nov 20 2002	Brief of respondents Buckeye Community Hope Foundation, et al. filed.
	Nov 20 2002	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Nov 20 2002	Brief amici curiae of National Fair Housing Alliance, et al.

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No. 01-1269-CFX

Entry	Date	Proceedings and Orders
		filed.
	Nov 21 2002	CIRCULATED.
	Nov 22 2002	LODGING consisting of twenty spiral bound copies of related material received from counsel for amici Natl. MultiHousing Council, et al. and distributed.
	Dec 5 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 5 2002	Motion of the Solicitor General to allow David B. Salmons to present oral argument pro hac vice filed.
	Dec 16 2002	Motion of American Planning Association for leave to file a brief as amicus curiae DENIED.
	Dec 16 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 16 2002	Motion of the Solicitor General to allow David B. Salmons to present oral argument pro hac vice GRANTED.
	Dec 20 2002	Reply brief of petitioners Cuyahoga Falls, Ohio, et al. filed.
	Jan 21 2003	ARGUED.

Supreme Court, U.S.
FILED
01126 9 FEB 26 2002
OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART;
CITY ENGINEER GERALD DZURILLA, AND
CLERK OF COUNCIL GREGG WAGNER,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION;
CUYAHOGA HOUSING PARTNERS, INC.;
BUCKEYE COMMUNITY THREE L.P.; AND
FAIR HOUSING CONTACT SERVICE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may the court inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal corporation?

2. In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?

3. Does the due process clause of the constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

4. Does 28 U.S.C. 1738 require a Federal District Court to apply *res judicata* to dismiss a federal case arising out of the same factual transaction as an earlier case decided by Ohio state courts?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioners

The petitioners are the City of Cuyahoga Falls, its Mayor, Don L. Robart, its former City Engineer, Gerald Dzurilla, and its former Clerk of City Council, Gregg Wagner. Petitioners were the defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Since this case was filed in 1996, both Gerald Dzurilla and Gregg Wagner have left their positions with the City.

Respondents

The respondents are Buckeye Community Hope Foundation, a not-for-profit corporation that seeks to construct housing projects utilizing low-income housing tax credits, Buckeye Community Three, L.P., a limited partnership that operates the housing project in question, Cuyahoga Housing Partners, Inc., a for-profit corporation acting as the general partner of Buckeye Community Three, L.P., and the Fair Housing Contact Service, a not-for-profit housing advocacy organization. Respondents were plaintiffs in the District Court and appellants/cross-appellees in the Court of Appeals. Petitioners are unaware of any publicly held companies owning 10% or more of the stock of any of the respondent entities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit Court of Appeals opinion was issued June 15, 2001, and is reported at *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001) (Appendix A at 1a). The unreported decision of the District Court, per Judge Dan Polster, granting summary judgment in favor of Petitioners was rendered on November 19, 1999, and is reproduced at App. B at 35a. An earlier decision of the District Court, per Judge Sam Bell, denying summary judgment, is reported *sub nom* at 970 F.Supp. 1289 (N.D. Ohio 1997) and reproduced at App. C at 55a. A report and recommendation of Magistrate Judge James Thomas recommending dismissal on the basis of *res judicata* is reproduced at App. D at 132a. An order denying rehearing *en banc* was issued December 4, 2001, and is reproduced at App. E at 192a. In addition, because this case involves the issue of *res judicata*, the following state court decisions are reproduced in the appendix: *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539 (July 16, 1998) (App. F at 194a); *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998) (App. G at 214a); *Buckeye Community Hope Foundation v. Cuyahoga Falls*, Summit App. No. 17933, unreported (12/11/96) (App. H at 246a) and *Buckeye Community Hope Foundation v. Cuyahoga Falls*, Summit C.P. No. CV 96-05-1701, unreported (5/31/96) (App. I at 255a.)

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on June 15, 2001, and denied a timely filed petition for rehearing *en banc* on December 4, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions, which are reproduced in the Appendix at App. J at 258a, et. seq.:

A. The First Amendment to the United States Constitution.

B. Section 1 of the Fourteenth Amendment to the United States Constitution.

C. 28 U.S.C. 1738.

D. 42 U.S.C. 3604.

E. Article IX, Section 2, Cuyahoga Falls Charter.

STATEMENT OF THE CASE AND FACTS

In January, 1996, Respondents (collectively referred to as "Buckeye") applied to the City of Cuyahoga Falls to construct an affordable housing project. Due to the size of the project, before building permits could be issued, a site plan had to be approved by the Cuyahoga Falls Planning Commission and City Council. Three public hearings were held and, between the three, some sixty of the City's 49,000 residents exercised their constitutional right to attend and express their opinions about the project. Some supported the project while others opposed it.

Despite any expressed opposition, however, both the Planning Commission and City Council approved the project, Council's approval being in the form of Ordinance 48-1996. The site plan approval was subject to several conditions which had to be met before building permits could issue, none of which were objectionable to Buckeye. Although Mayor Don Robart personally opposed the project, he silently approved the ordinance by not exercising his veto power. The District Court, per Judge Polster, stated that Mayor Robart voted against the project. This was an unfortunate error as, in Cuyahoga Falls, the Mayor has no vote on City Council. Rather, his role in legislation is to either approve it by signing it, or veto it. If he does neither, the ordinance is deemed approved the same as if he had signed it. Mayor Robart took this latter action, approving the ordinance by doing nothing with it.

Although Ordinance 48-1996 was passed, it did not retain emergency status, meaning it was scheduled to take effect on May 2, 1996. This would have been the earliest date the City could issue building permits to Buckeye, assuming it fulfilled all of the conditions of site plan approval — which it did not. However, on April 29, 1996, over 4,300 citizens exercised their right to petition the government by timely filing a facially neutral referendum petition seeking a popular vote on Ordinance 48-1996. Under Article IX, Section 2 of the Cuyahoga Falls Charter (App. J at 264a), the referendum petition stayed the effectiveness of Ordinance 48-1996, meaning the City could not issue building permits until the efficacy of the ordinance was resolved.

On May 1, 1996, Buckeye filed an action in the Summit County Common Pleas Court seeking to enjoin the referendum process, arguing that the referendum violated the Ohio Constitution. Specifically, the Cuyahoga Falls Charter permits referenda to review "any ordinance or resolution" and

does not distinguish between legislative and administrative actions of City Council. Article IX, Section 2, Cuyahoga Falls Charter. (App. J at 264a) By contrast, the Ohio Constitution provides for referenda to review only legislative actions. At issue in Buckeye's state court action was whether the people of home-rule chartered cities could reserve unto themselves broader referendum rights than are reserved by the Ohio Constitution.

Trial was held and, on May 31, 1996, the Common Pleas Court entered final judgment upholding the referendum and denying the request for injunctive relief. (App. I at 255a) The referendum election went forward in November, 1996, and Ordinance 48-1996 was defeated. In the meantime, Buckeye pursued appeals to the Ohio Ninth District Court of Appeals (App H at 245a) and Ohio Supreme Court, which resulted in further orders upholding the referendum petition as lawful. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). (App. G at 214a) Both courts held that home-rule cities could reserve greater referendum rights than were reserved under the Ohio Constitution. Throughout this time period, the City obeyed these orders and honored the judicially upheld referendum and its preemptive effect on the City's ability to issue building permits.

Then, on July 16, 1998, the Ohio Supreme Court reconsidered its decision and reversed itself, ruling that home-rule cities are limited to the specific referendum provisions found in the Ohio Constitution. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539, (July 16, 1998). (App. F at 194a) As before, the City obeyed this judgment and informed Buckeye that once it complied with all of the conditions of the site plan approval, the City would issue building permits. After Buckeye complied with the agreed-upon site plan conditions, the City issued building permits. The project has since been constructed.

After the Common Pleas Court entered final judgment denying injunctive relief, Buckeye filed this lawsuit in District Court, again seeking to enjoin the referendum election. Buckeye also sought damages under federal civil rights laws. Buckeye claimed that, by honoring the referendum process, the City violated the equal protection and due process clauses of the Constitution and the Fair Housing Act. 42 U.S.C. 3604, et. seq.

The City argued that the case was barred by *res judicata* in light of the judgment that had been rendered in the state case. See 28 U.S.C. 1738. The District Court referred the matter to Magistrate Judge James Thomas, who agreed with the City and recommended that the case be dismissed. (App. D at 132a) District Judge Sam H. Bell, however, disagreed and refused to dismiss the case. 970 F.Supp. 1289. (App. C at 55a) Discovery continued after which Judge Bell invited summary judgment motions on the merits of the case. As the motion pleadings were being filed, Judge Bell retired and was replaced by Judge Dan Polster, who granted the City's motion for summary judgment on the merits, without addressing the issue of *res judicata*. (App. B at 35a) Buckeye appealed to the Sixth Circuit Court of Appeals, which reversed, holding that the City could be held liable for honoring the referendum even though it was both facially neutral and upheld by three Ohio courts. (App. A at 1a) The City timely filed a motion for rehearing *en banc* which was overruled on December 4, 2001. (App. E at 192a)

REASONS FOR GRANTING THE WRIT

This case of constitutional import is one of first impression in this Court. The Sixth Circuit held that the City's honoring of a facially neutral and judicially upheld referendum petition could constitute a violation of the equal protection and due process clauses of the Constitution as well

as the Fair Housing Act. This holding is not only erroneous, but constitutionally dangerous. The threat of liability caused by the Sixth Circuit's ruling will chill the exercise of the freedom to peaceably assemble, attend public meetings, express political opinions and petition the government. It will also seriously erode any confidence parties can place in their reliance upon valid court judgments. Indeed, the Sixth Circuit's opinion places cities in the precarious position of having to choose to disobey valid state court judgments in order to avoid liability in federal court. Such is the very dilemma the doctrine of *res judicata* was intended to prevent. For this reason, federal courts are required to give full faith and credit to the judgments of state courts. 28 U.S.C. 1738.

I. The Decision of the Court of Appeals Seriously Jeopardizes the First Amendment Freedoms of Political Expression.

The Court of Appeals ruled that the City could be held liable for honoring the political acts of its citizens who pursued a referendum petition. It must be emphasized that this case does not involve the *result* of a referendum vote. Indeed, Buckeye commenced this lawsuit some four months *before* the vote took place, for it was the *filing* of the referendum petition that prevented the City from issuing building permits. Thus, the Court of Appeals held that the City could be held liable for the mere filing of a referendum petition and the expression of political views on the subject matter of that petition. This Court has never taken such an extreme position.

Quite the contrary, this Court has long recognized the need to preserve and protect the right of referendum. See, *e.g.*, *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court recognized that the right of initiative — functionally the same

as referendum — involved "core political speech," and that the right to petition for political change and engage in discussions about that change "is guarded by the First Amendment." Following this guidance, the First Circuit Court of Appeals ruled that not holding a scheduled election would violate due process by disenfranchising an entire city. *Bonas v. North Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001). See also *James v. Valtierra*, 402 U.S. 137 (1971), where this Court upheld a California constitutional provision that *required* a referendum on all low-income housing projects.

Similar decisions from the Ohio Supreme Court have upheld the people's right to seek and hold a referendum election even where the result of the ultimate vote may contravene the rights of others. *Jurcisin v. Cuyahoga Co. Bd. of Elections*, 35 Ohio St. 3d 137 (1988); *State ex rel. Bond v. Montgomery*, 63 Ohio App. 3d 728 (1989). In accordance with these cases, and in compliance with its charter, the City honored the referendum petition filed in this matter. The City's reverence for the referendum was reaffirmed when all three levels of Ohio courts upheld its validity under the Ohio constitution. The fact that the Ohio Supreme Court ultimately reversed itself — saying the people could not use a referendum to review an administrative act — does nothing to minimize the federal constitutional interest in preserving the right of the people to assemble, attend public meetings, express their political views, and petition the government. While not all referenda have the same legal effect, the right of the people to pursue such petitions should not be impaired by a fear of judicial reprisal. See *Meyer v. Grant*, *supra*.

It is within the context of this need to preserve the freedom of political expression that this case must be analyzed. However, the court below failed in that analysis,

and in its failure, placed in jeopardy the very constitutional rights the judiciary is duty-bound to uphold.

II. The Honoring of a Facially Neutral and Judicially Upheld Referendum Petition does not Violate the United States Constitution or the Fair Housing Act.

A. The Court of Appeals Improperly Inquired into the Motives of a Handful of Citizens to Find a Basis for Liability Against an Entire City for Alleged Intentional Discrimination.

This Court has held that an equal protection violation can be found where a government decision-maker is motivated by racial discrimination. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977). Intentional discrimination can also violate the Fair Housing Act. *Selden Apts. v. United States Dept. of H.U.D.*, 785 F.2d 152 (6th Cir. 1986). Buckeye claimed that the City's withholding of building permits resulting from the filing of the referendum petition was motivated by an intent to racially discriminate. Yet, rather than looking to the motivations of the City's decision-maker, Buckeye focused its attack on the motives of various citizens who expressed support for the referendum. The District Court properly rejected this approach, holding in reliance upon *Arlington Heights*, that "a showing of discriminatory intent on the part of *City officials* is necessary for the Plaintiffs to prevail on their equal protection claim." (App. p. 46a) [emphasis in original] The Court of Appeals disagreed and held that the City could be held liable for intentional discrimination based on the motivations of its *citizens* as opposed to those of its government *decision-makers*. This holding is contrary to *Arlington Heights*.

In *Arlington Heights*, many citizens expressed opposition to the project at issue on arguably racial grounds. However, this Court limited its analysis to the motivations of

government decision-makers and did not examine the motives of the citizenry. This Court stated that relevant evidence of motivation may include the historical background of "official actions," or "contemporary statements by members of the *decisionmaking body*." *Arlington Heights*, *supra*, 429 U.S. at 267-268 [emphasis added]. The Court did not include in its inquiry evidence of the comments and actions of the citizenry.

Arlington Heights was followed and further explained in the Sixth Circuit case of *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986). In facts very similar to the instant case, the court held that, where a referendum is facially neutral, courts may not inquire into the motivations of the citizenry to find intentional discrimination. While both courts below found the instant referendum to be facially neutral, the Court of Appeals erroneously went on to require the very inquiry *Arthur* prohibits. In rejecting such an inquiry, the *Arthur* court warned at 782 F.2d 574, "Carried to its logical extreme, plaintiffs-respondents could establish a violation of the equal protection clause if one voter testified that racial considerations motivated the voter's vote * * *."

This "logical extreme" has taken firm root in the instant case under the Court of Appeals decision. The decision-makers in this case were City Council with respect to the site plan approval and the City Engineer with respect to the issuance of building permits. Thus, under *Arlington Heights* and *Arthur*, any analysis of motives must focus on the motives of City Council and the City Engineer.

Since City Council approved the site plan, its motives were of no interest to Buckeye. While Mayor Robart voiced opposition to the project, City Council rejected the Mayor's comments and approved the site plan. Furthermore, when it came to official action, the Mayor eschewed his own opposition and allowed the site-plan ordinance to be "pocket

approved" by not exercising his veto power. Thus, with respect to the approval of the site plan, all voiced opposition was rejected by the government decision-makers. Moreover, concerning the decision to withhold building permits, Buckeye never presented any evidence that the City Engineer was motivated by an intent to discriminate; rather all evidence was that he was motivated solely by the need to obey the law as that law was presented to him, first by the Law Director, and later by the Ohio courts.

Without evidence of discriminatory intent on the part of the City decision-makers, the Court of Appeals strayed from *Arlington Heights* and tried instead to divine the motives of the citizens who supported the referendum. The referendum, however, was signed by over 4,300 electors, whose identities and motives were completely undisclosed on the record. Not finding discriminatory intent among the actual referendum petitioners, the court then turned to analyze the comments of some sixty people who attended the various public hearings. While most of the comments were about perfectly valid concerns, such as the impact of the project on taxes, traffic, the schools and City infrastructure, the court found literally a handful of comments concerning safety and "downgrading" the community, and concluded that those comments veiled underlying racial discrimination. Then, the court improperly imputed those comments, first to the referendum petitioners and then to the City itself. This result is contrary to *Arlington Heights* and *Arthur* and wrongfully punishes an entire City for the political comments of a few citizens.

The court mistakenly justified its approach on the basis of *United States v. City of Birmingham*, 727 F. 2d 560 (6th Cir. 1984). In *Birmingham*, the city was faced with an unpopular housing project which drew much public comment, much of which evidenced discriminatory motives. In response to the discriminatory comments of its citizens, and "for the sole

purpose" of effectuating those comments, the city decision-makers voluntarily submitted the matter to a non-binding referendum. The referendum was the choice of the decision-makers, not the citizenry as no referendum petition was filed. In essence, the decision-makers sought to relieve themselves of the obligation to make a decision by passing the buck to the electorate. By voluntarily choosing to act to advance the discriminatory motives of the citizenry, Birmingham's decision-makers effectively adopted those motives as their own.

Such is not the case here. In this case, no one, including Buckeye and the Court of Appeals, has ever suggested that the City acted for the "sole purpose" of effectuating improper discrimination. In fact, the very opposite is the case. When members of the public expressed opposition to the project, the City decision-makers *rejected* that opposition and approved the project. In fact, each act within the City's discretion was taken *in favor* of Buckeye's project. The City withheld building permits only when its discretion was removed from it by the facially neutral and judicially upheld referendum petition. Thus, unlike *Birmingham*, the City honored the referendum because it was required to by law, not out of a discretionary and voluntary choice to effectuate unlawful discrimination.

The Court of Appeals has strayed from this Court's holding in *Arlington Heights*. It has diligently sought intentional discrimination, even to the point of seeking it in non-government decision-makers. In doing so, it threatens to hold municipalities liable for nothing more than the political speech of their citizens. The court's holding goes far beyond any legal precedent and cannot be allowed to stand.

B. The Court of Appeals Improperly Recognized a Substantive Due Process Claim in the Absence of a Legitimately Held Property Interest, a Decision that Conflicts with a Decision from the Fourth Circuit.

This Court has held that, to establish a due process violation, the plaintiff must first establish a property interest in the thing denied. *Board of Regents v. Roth*, 408 U.S. 564 (1972) Buckeye claimed that the referendum improperly denied it the benefit of a site plan approval and the resulting issuance of building permits. In agreeing with this argument, the Sixth Circuit deviated from this Court's holding in *Roth*.

Courts have repeatedly held that, as long as the governing body retains some discretion in denying the sought-after permit or approval, there can be no property interest subject to federal due process protection. *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995); *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992).

Rather than following these cases, the Sixth Circuit weakly attempted to draw distinctions. For example, the court below stated that, in *Triomphe*, the proposed use of property did not comport with the existing zoning code, whereas in this case the site plan did. This simply is not true. *Triomphe* specifically relied upon an earlier state court finding that "all the zoning requirements set forth in the City Code were satisfied." *Id.* at 49 F.3d 198.

This is precisely the same claim made here by Buckeye, that its proposed use satisfied all of the City's zoning requirements. However, that was not enough to establish a due process property right in *Triomphe*, nor is it enough here. Buckeye must also establish that the site plan approval process itself left the City with no discretion. However, the process in Cuyahoga Falls reserves discretion to the City in

considering site plans. Cuyahoga Falls Ord. 1144.04 (App. J at 266a). That being the case, *Triomphe* requires a finding that Buckeye has no property interest in the site plan approval. To the extent that the Court of Appeals held otherwise, its decision is not only inconsistent with its earlier decision in *Triomphe*, but is also inconsistent with a similar decision from the Fourth Circuit. *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992) Thus, a decision by this Court is necessary to resolve this newly created conflict among the circuits.

A due process violation also requires that the government's action be arbitrary and capricious in the strict sense, that there is no rational basis for it. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). However, the City had the most rational of bases for honoring the referendum and withholding permits; it was required to by law. By local charter, the filing of the referendum stayed the effectiveness of the site plan approval. For over two years, this charter provision and the resulting referendum petition were judicially upheld until the Ohio Supreme Court finally overruled itself. Due process does not guarantee that a city will never make an incorrect decision that gets overturned through litigation. *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976).

As the withholding of building permits was required by a judicially upheld referendum petition, there was neither a property interest in the desired permits, nor was the City's withholding of the permits arbitrary, capricious or without a rational basis. To the extent the Court of Appeals held otherwise, its decision is contrary to this Court's ruling in *Board of Regents v. Roth*, *supra*, and the circuit court decisions in *Triomphe Investors v. Northwood*, *supra*, *Gardner v. Baltimore Mayor and City Council*, *supra*, and *Pearson v. Grand Blanc*, *supra*.

C. The Court of Appeals Improperly Recognized a Disparate Impact Claim Under the Fair Housing Act for the Filing of the Referendum Petition.

Buckeye also claimed that the referendum had a disparate impact on protected classes contrary to the Fair Housing Act. This Court has never held that a disparate impact claim can be established by the impact of a facially neutral referendum. Furthermore, until this case, the Sixth Circuit had likewise refused to recognize such a claim. *Arthur v. Toledo*, *supra; Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994). Thus, the instant decision of the Sixth Circuit plows new legal ground that improperly exalts statutory interests over greater rights guaranteed by the Constitution.

Liability under the FHA for disparate impact in the case of a referendum will all but eliminate the exercise of first amendment rights in the context of low-income housing. For this reason, *Arthur v. Toledo*, *supra*, held that, in the referendum context, mere impact alone will not support a finding of an FHA violation. *Arthur* stated at page 575, "Given the strong policy considerations underlying referendums, we fear that *recognizing a cause of action* in such instances goes far beyond the intent of Congress and could lead courts into untenable results." [emphasis added]

Given this Court's abiding respect for the referendum petition, the *Arthur* court's refusal to base an FHA disparate impact claim on the filing of a referendum petition is understandable. However, the Sixth Circuit strayed from it's earlier holding in *Arthur*, and found in the instant case that the mere filing of a facially neutral referendum petition could indeed be the basis of a disparate impact claim under the Fair Housing Act.

The court below justified its holding on what it believed to be "highly unusual circumstances." Yet, the circumstances

of this case are no more unusual than those found in *Arthur*. For example, the Court of Appeals found it highly unusual that this was the first referendum in the City concerning low-income housing. Using circular reasoning, the court found that this referendum could be illegal under the FHA because the City never before violated the law by filing a similar referendum. Conversely, under the court's logic, if this were but one of many referenda concerning low-income housing, then it would not be highly unusual and, therefore, not the basis of FHA liability.

The Sixth Circuit also found it highly unusual that the Ohio Supreme Court ultimately found the referendum to be beyond the scope of the Ohio Constitution. However, that finding cannot be viewed apart from its placement in time. Before overruling the referendum, the Supreme Court *affirmed* the findings of the lower courts upholding it. As long as those decisions remained intact from May, 1996, until July, 1998, the City was bound to obey them and it cannot be said to be highly unusual that it would do so.

The Court of Appeals' torturous attempt to find an exception to *Arthur* only underscores *Arthur's* concern about courts reaching untenable results. In holding as it did, the Court of Appeals has exalted the FHA over the first amendment and that, by itself, creates the climate for untenable results. Nothing can be more untenable than punishing a City because its citizens petitioned their local government or because the City officials had the audacity to actually obey valid court decisions upholding the validity of the petition. Accordingly, it is imperative that this Court reaffirm the wisdom of *Arthur* that a facially neutral — and, in this case, judicially upheld — referendum petition cannot be the basis of a disparate impact claim under the FHA.

III. 28 U.S.C. 1738 and *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984), Require that this Federal Litigation be Dismissed on the Basis of *Res Judicata*.

Federal courts are required to give full faith and credit to the judgments of state courts. 28 U.S.C. 1738. (App. J at 258a) Applying the doctrine of *res judicata*, final judgments from state courts are entitled to the same preclusive effect in federal courts as they have in their home states. *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984).

Under Ohio law, a final judgment in an action "bars *all* subsequent actions based upon *any claim* arising out of the transaction or occurrence that was the subject matter of the previous action * * * " *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995), Syl. [emphasis added] Magistrate Judge James Thomas followed this holding in recommending dismissal. Judge Bell disagreed and, in doing so, created an exception to *res judicata* that does not exist in Ohio law. Judge Bell's was the last analysis of *res judicata* in this case; Judge Polster did not address it in granting summary judgment and the Court of Appeals simply deferred to Judge Bell's opinion.

The holding in *Grava* cited above is based on the Restatement of Judgments 2d, Sections 24-25, which apply the transactional view of *res judicata*. Under that view, all actions arising out of a single factual transaction must be brought at the same time or forever be barred. *Res judicata* applies even where the plaintiff seeks a different remedy in the second case than was sought in the first action. *Grava*, *supra*. Magistrate Judge Thomas set forth very clearly that both the state and federal lawsuits arose out of the same transaction — see App. D at 186a-190a — and neither

Buckeye nor Judge Bell seriously contended this point. Thus, *Grava* would require dismissal of this case.

Section 33 of the Restatement, however provides an exception to *res judicata*. Under Comment c of that section, *res judicata* does not bar a second lawsuit where the first lawsuit sought *solely* a declaratory judgment. The Ohio Supreme Court has never addressed or adopted this provision of the Restatement, although it was applied in one case from an Ohio appellate court predating *Grava*. *Jamestown Village Condo. Owners Assoc. v. Market Media Research*, 96 Ohio App. 3d 678 (1994).[1] While the *Jamestown* court applied the declaratory judgment exception, it emphasized at page 687 that the initial lawsuit sought "a declaratory judgment — nothing more."

The seeking of any form of coercive relief in the first case, such as an injunction, destroys the exception to *res judicata*. See *Mandarino v. Pollard*, 718 F.2d 845 (7th Cir. 1983); *Minneapolis Auto Parts Co. v. Minneapolis*, 739 F.2d 408 (8th Cir. 1984); *Cimasi v. Fenton*, 838 F.2d 299 (8th Cir. 1988); *Smith v. Chicago*, 820 F.2d 916 (7th Cir. 1987). In fact, one of the cases relied upon in *Jamestown* held, "However, a plaintiff who brings an action for both declaratory and coercive relief is thereafter barred from bringing a suit for further coercive relief, *either legal or equitable*, based upon the same cause of action." *Radkey v. Confalone*, 133 N.H. 294 (1990). [emphasis added]

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[1] A second case discussed the declaratory judgment exception. *Ketchel v. Bainbridge Twp.*, 79 Ohio App. 3d 174 (1992). This case, however, is of no precedential value as the court affirmed the dismissal of the case due to an insufficient record. Any discussion of *res judicata* is, therefore, *dictum*.

Nothing in Ohio law permits a plaintiff to bring successive actions for coercive relief, including injunctive relief, arising out of a single transaction. Buckeye's state law action sought both declaratory and coercive relief. Thus, even under the *res judicata* exception found in *Jamestown*, Buckeye's second action would be barred under Ohio law. That being the case, it is barred in federal court. 17 U.S.C. 1738; *Migra v. Warren City School Dist. Bd. of Education*, *supra*.

Judge Bell, and hence the Court of Appeals, erred in not applying Ohio law to this case. Rather, Judge Bell attempted to minimize Buckeye's request for injunctive relief in the state courts saying that it was only incidental to the paramount request for declaratory relief.

However, it is apparent that Buckeye's state case was, first and foremost, one for injunctive relief. The Common Pleas Court began its decision by saying, "This cause came on before this Court on the 15th day of May, 1996, *for preliminary and permanent injunction* * * * " and ended by saying, "For all of the above reasons, the Motion for Preliminary or Permanent Injunction of the Plaintiffs [Buckeye] is hereby denied." (App. I pp. 255a, 257a) [emphasis added] Likewise, the state Court of Appeals opened its opinion with the words, "Appellant Buckeye Community Hope Foundation appeals the decision of the Summit County Court of Common Pleas denying *preliminary and permanent injunctive relief*" and ended with "The decision of the trial court denying *preliminary and permanent injunctive* relief is affirmed." (App. H pp. 247a, 253a) [emphasis added] Clearly, Buckeye's request for injunctive relief was not merely incidental to its request for declaratory relief. Rather, the request for injunctive relief was the heart of Buckeye's case.

Under any reading of Ohio *res judicata* law, a second lawsuit is barred where the first lawsuit sought coercive relief in the form of an injunction. *Grava v. Parkman Township*, *supra*; *Jamestown Village Condo. Owners Assoc. v. Market Media Research*, *supra*. The fact that Buckeye also happened to seek a declaratory judgment does not remove this case from the Ohio law dealing with *res judicata*. Otherwise, plaintiffs could always avoid *res judicata* by simply adding a count to their complaint seeking a declaratory judgment. Such is not the law of Ohio.

The doctrine of *res judicata* is crucial to this case because the state courts repeatedly upheld the validity of the referendum that preempted the City's ability to issue building permits. Now, Buckeye wants to hold the City liable in damages for obeying the very court orders Buckeye sought in the first place. The doctrine of *res judicata* was intended to prevent this injustice and 28 U.S.C. 1738 was intended to preserve the validity of state court judgments in federal courts. By not applying *res judicata*, the Court of Appeals failed to follow 28 U.S.C. 1738 and *Migra v. Warren City School Dist. Bd. of Education*, *supra*.

CONCLUSION

The City harbors no illusions about this being an easy case; it is not. The City's appendix consists mainly of eight separate and conflicting opinions that have been rendered by the state and federal courts in litigation arising out of this matter. Seventeen different judicial officers have considered this litigation in state and federal courts. Collectively, ten of them have joined together in five opinions in the City's favor; eight of them have joined in three opinions in favor of Buckeye. Clearly, this is not an easy case and this Court's attention is required to preserve constitutional rights.

The adage, "hard cases make bad law," has, unfortunately found a home in the decision of the Court of Appeals. The law announced by the Sixth Circuit is bad. In its zeal to protect the statutory interests of a property owner, the Sixth Circuit has overlooked even greater constitutional rights, the right of citizens to assemble, to speak, to petition the government, and to vote.

The Court of Appeals in the earlier case of *Arthur v. Toledo*, *supra*, expressed concern over the possibility of "untenable results" in cases involving referenda. This case is the fulfillment of that concern. The decision of the court below threatens the following "untenable results:"

1. The freedom of speech will no longer apply to criticism of low- income housing as any such criticism will be viewed as veiled racial bigotry.

2. City councils will need to silence citizens who wish to express unsavory opinions, because any official action taken that is consistent with the voiced opinions of even a handful of citizens will be subject to liability even if the city's actions were taken in obedience to valid court judgments.

3. Any referendum petition will be subject to the scrutiny of the motives of each and every person circulating, signing, or merely speaking in support of the referendum.

4. Innocently motivated petitioners will need to fear that another person with not so innocent motives will subject their entire city to liability.

5. Plaintiffs will be able to obtain multiple bites at the judicial apple, even obtaining inconsistent results and holding the defendants liable for obeying those inconsistent results.

If the City can be held liable in this case, it will not be because it honored a facially neutral referendum; so much

was required of it by three state court decisions. It will also not be because it gave effect to the discriminatory motives of its citizenry as it exercised all discretion it had in opposition to any such motives.

Rather, any finding against the City will be because a handful of citizens exercised their first amendment right to express their political opposition to low-income housing, even though the City rejected such opposition, approved the project, and honored a referendum in obedience to court judgments upholding its validity. Liability under such circumstances simply cannot be permitted in a constitutional republic. The first amendment cries out for this Court to grant the writ of certiorari and the City respectfully so requests.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 99-4555; 00-3052

Buckeye Community Hope Foundation, et al., *Plaintiffs-Appellants/Cross-Appellees*,	)
v.	)
City of Cuyahoga Falls, et al., *Defendants-Appellees/Cross-Appellants*.	)

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 96-01458--Dan A. Polster, District Judge.
Argued: June 15, 2001
Decided and Filed: August 31, 2001
Before: JONES, DAUGHTREY, and COLE, Circuit Judges.

COUNSEL

ARGUED: Edward G. Kramer, KRAMER & ASSOCIATES, Cleveland, Ohio, for Appellants. Virgil E. Arrington, LAW DIRECTOR, CITY OF CUYAHOGA FALLS, Cuyahoga Falls, Ohio, for Appellees.

ON BRIEF: Edward G. Kramer, KRAMER & ASSOCIATES, Cleveland, Ohio, Diane E. Citrino, FAIR HOUSING LAW CLINIC, Cleveland, Ohio, for Appellants. Virgil E. Arrington, LAW DIRECTOR, CITY OF CUYAHOGA FALLS, Cuyahoga Falls, Ohio, for Appellees.

OPINION

NATHANIEL R. JONES, Circuit Judge. This case involves a federal civil rights suit brought by Plaintiffs-Appellants, Buckeye Community Hope Foundation, et al., against the Defendants-Appellees, the City of Cuyahoga Falls ("City"), et al., alleging that the City's decision to allow a referendum to stay the effectiveness of Appellants' lawfully approved site plan violated their constitutional and statutory rights. Appellants appeal the district court's grant of summary judgment which dismissed their equal protection, substantive due process, and Fair Housing Act claims. Because there are genuine issues of material fact with regard to all three claims, we **REVERSE** the lower court's grant of summary judgment.

I. BACKGROUND [1]

Plaintiff, the Buckeye Community Hope Foundation ("Foundation"), is a not-for profit 501(c)(3) corporation. It

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[1] These facts are derived primarily but not exclusively from Judge Bell's opinion below. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 970 F. Supp.1289 (N.D. Ohio 1997).

has as its purpose the development of affordable housing through the use of low-income housing tax credits. For each project, a separate limited partnership is formed as the investment vehicle to sell the tax credits. In this case, the specific limited partnership is plaintiff, Buckeye Three Limited. The limited partnership is the owner of the land, and once it is completed, the development. To protect each development and its investors, the Foundation forms a separate corporation to act as the general partner for the limited partner. In this case, plaintiff Cuyahoga Partners, Inc., a for-profit corporation, was formed to serve as the general partner of Buckeye Three Limited. Steven Boone is the president of Cuyahoga Partners, Inc.

Mr. Boone contacted the Mayor of the City of Cuyahoga Falls, Don Robart, in the summer of 1995 about the possibility of developing a low-income housing complex in Cuyahoga Falls. According to Mr. Boone, the Mayor expressed no problems about the proposed development at that time.

On June 12, 1995, the Foundation purchased the real property located on Pleasant Meadow Boulevard. On February 21, 1996, the "site plan" for the property was submitted for approval at a meeting of the Planning Commission for Cuyahoga Falls. Members of the public attended this meeting and raised several questions about the project. Some of the citizens expressed concern about the impact that the project would have on their neighborhood. For example, Lee Minier, a lifelong resident of Cuyahoga Falls, expressed concerns about safety and stated "they know what kind of element is going to move in there." Joint Appendix ("J.A.") at 154. Another resident stated that "[t]here will be a different class of people living there." *Id.* In connection

with the Planning Commission's meeting, Cuyahoga Planning Director, Louis Sharpe, prepared a Staff Summary of the site plan. This summary recommended approval of the site plan subject to approximately nine conditions agreed to by Mr. Boone. One of the conditions required the developers to erect a fence on one side of the property before the building permit for the apartment complex could issue.

Notwithstanding the aforementioned opposition of various citizens, the site plan, including the conditions, was unanimously approved by the Planning Commission at the February 21, 1996 meeting. The Planning Commission's recommendation then had to be submitted to and approved by the City Council. Mayor Robart did not attend the February 21, 1996 Planning Commission meeting.

On March 4, 1996, the Planning Commission's recommendation on the site plan was addressed at a City Council meeting attended by Mayor Robart. At this meeting, members of the public again voiced their concerns about the project. Ann Bridges expressed concern about the extra crime and drugs that come with low-income housing. J.A. at 961. Mayor Roberts voiced his opposition to the project. The Mayor referred to an article entitled "Stuck in the Ghetto" which discussed the various problems associated with Section 8 housing (the project at issue does not involve Section 8 vouchers). J.A. at 966.

Another City Council meeting was held on March 18, 1996. Once again, members of the public expressed their opposition to the project. One resident of Cuyahoga Falls objected to the project on the ground that "[t]here will be . . . kids running around in our yards." J.A. at 949. Mayor Robart, in a lengthy statement, once again voiced his

opposition. The Mayor stated that the issue was not whether the project was properly zoned, but rather the issue was low-income housing. The Mayor noted that "people who spent a lot of money on their condominiums simply don't want people moving in their neighborhood that are going to be renting for $371." J.A. at 945. Another Council meeting occurred on April 1, 1996, and the site plan was approved by a vote of six to three with two abstentions. The City Council's approval was expressed in the form of Ordinance No. 48-1996.

Parallel to the site approval process, a referendum effort was proceeding. On April 9, 1996, the "Citizens for the Preservation of Voter Rights" convened a meeting to discuss "taking the ISSUE OF A 72 UNIT HOUSING DEVELOPMENT ON PLEASANT MEADOW BLVD. to the vote of the people of Cuyahoga Falls in November." The Mayor spoke at the meeting and stated that he supported the referendum effort. Lee Minier testified that no City of Cuyahoga Falls officials were asked to sign the referendum petitions. On or about April 29, 1996, a referendum petition was submitted to the Clerk of City Council, Gregg Wagner. The Board of Elections approved the referendum petition on May 1, 1996.

On May 1, 1996, plaintiffs filed a state action in the commons pleas court of Summit County to enjoin the referendum process under Ohio law. The plaintiffs sought injunctive relief and a declaration that the ordinance could not be challenged by referendum because its passage by City Council was an administrative, rather than a legislative action. Plaintiffs claimed that Article II, Section 1f of the Ohio Constitution did not grant powers of referendum to citizens of municipalities on administrative actions taken by municipal legislative bodies. On May 15, 1996, the state trial court

conducted a hearing on plaintiffs' request for preliminary injunction. On May 31, 1996, the court denied the plaintiffs' motion for preliminary or permanent injunction. The court found that the Charter of Cuyahoga Falls permitted the residents of Cuyahoga to exercise powers of referendum on any action by City Council, regardless of whether the action taken was legislative or administrative in nature. Plaintiffs appealed the decision of the trial court to the court of appeals for Summit County. The court of appeals affirmed the judgment of the trial court, holding that Article II, Section 1f of the Ohio Constitution does not limit the referendum powers of charter municipalities such as Cuyahoga Falls. The Ohio Supreme Court affirmed the judgment of the court of appeals.

On June 20, 1996, Gilbertson Barno, the Executive Director of the Foundation, wrote to the City of Cuyahoga Falls seeking the issuance of a building permit. On June 26, 1996, Gerald Dzurilla, the City Engineer for Cuyahoga Falls, sent a letter to Barno indicating that he could not issue the building permit in light of the pending referendum.

Plaintiffs filed the present federal action on July 5, 1996. In contrast to the complaint filed in state court, the complaint filed in federal court was based on federal law. The plaintiffs alleged violations of the Fair Housing Act, 42 U.S.C. §§ 3601 et seq., 42 U.S.C. §§ 1981 and 1982, the Due Process Clause of the Fourteenth Amendment via 42 U.S.C. § 1983, and the Equal Protection Clause of the Fourteenth Amendment via 42 U.S.C. § 1983. Plaintiffs sought injunctive relief and damages. Defendants brought a motion for summary judgment seeking to dismiss all of plaintiffs' claims. On November 19-21, 1996, Judge Sam H. Bell conducted a hearing and heard evidence regarding plaintiffs'

request for a preliminary injunction. Ultimately, the court approved an injunction stipulated to by the parties which enjoined the Summit County Board of Elections from certifying the results of a referendum concerning plaintiffs' ability to build low-income housing on land in Cuyahoga Falls. However, because the lower court found that plaintiffs failed to prove irreparable harm, their request for an injunction ordering the City of Cuyahoga Falls to issue a building permit was denied. In the order denying plaintiffs' preliminary injunction request, Judge Bell deferred consideration of the merits of the underlying causes of action, concluding that such consideration would be more appropriately addressed after evaluation of defendants' motions for summary judgment. Judge Bell then referred those motions to Magistrate Judge James D. Thomas for a report and recommendation. Judge Thomas recommended that defendants' motions for summary judgment be granted.

Judge Bell ultimately disagreed with the magistrate's recommendation. Judge Bell noted that in order to understand plaintiffs' federal claims it is important to understand the procedural context in which the referendum arose:

> The Cuyahoga Falls City Council approved the ordinance which embodied [p]laintiffs' site plan on April 1, 1996. The Mayor did not sign the ordinance, but according to City Charter Article 2, Section 5, if the mayor does not act upon the ordinance within ten days then the ordinance shall take effect in the same manner as if he had signed it, what this court will refer to as "pocket approval." So ten days after its passage by the Council, the ordinance was pocket approved by the Mayor. As of this stage there was no evidence that the City [d]efendants did anything to

give effect to the citizen's [sic] petition.

. . . .

[T]he ordinance was to take effect "as provided by law". . . . Ohio Revised Code Section 705.16 provides that "All ordinances or resolutions shall be in effect after thirty days from the date of their passage . . . ." Section 1.14 of the Ohio Revised Code tells us that when counting thirty days, the first day is excluded and the last day included. . . . [T]he ordinance was to take effect . . . on May 2, 1996.

. . . .

The City Charter states that within 30 days after the Council passes an ordinance, citizens of the city may file a petition signed by at least ten percent of the electors requesting that such ordinance be repealed or submitted to the voters as a referendum. (Charter Art. IX, § 2.) Such a petition was filed in this case on or about April 29,1996. If the ordinance so challenged is not repealed by the Council within 30 days, the ordinance is to be submitted to a vote of the people. The ordinance itself cannot "go into effect until approved by a majority" of the electorate. (Charter Art. IX, § 2.)

. . . .

It is axiomatic that in order for an ordinance to "go into effect" it cannot already be in effect. . . . [T]he court must conclude that the ordinance has never gone into effect. At some moment in time after the filing of the petition and before the ordinance was to take effect on May 2, the effectiveness of the ordinance was

stayed.

See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 970 F. Supp. 1289, 1307-08 (N.D. Ohio 1997).

Judge Bell further noted that upon the filing of the petition, City Engineer Dzurillla sought advice from the City Law Director concerning the effect of the petition on his authority to issue building permits for the property identified in the ordinance. On April 30, 1996, Dzurilla received a response indicating that building permits for the construction of the apartment complex could not be issued because the site plan ordinance "does not take effect" due to the petitions. *Id.* at 1308. Judge Bell concluded that "practically as well as theoretically speaking, the [p]laintiffs were unable to secure the benefit of their otherwise lawfully approved site plan on the date that the site plan was to take effect, May 2, 1996." *Id.*

After extensive legal analysis, Judge Bell concluded that there were genuine issues of material fact precluding summary judgment with respect to plaintiffs' race-based equal protection, Fair Housing Act, and substantive due process claims. *Id.* at 1316, 1318, 1320.

On May 6, 1998, the Ohio Supreme Court, upon a motion for reconsideration filed by the plaintiffs, again ruled on the issue of whether the defendants use of a referendum to reject plaintiffs' site plan violated the Ohio Constitution. The City Charter of Cuyahoga Falls provides that voters may exercise powers of referendum on any ordinance passed by the City Council. J.A. at 129. However, Article II, Section 1f of the Ohio Constitution provides that "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may

now or hereafter be authorized by law to control by *legislative* action . . . ." Ohio Const. art. II, § 1f. (emphasis added). The Ohio Supreme Court held that the action taken by the Cuyahoga City Council was clearly administrative and not legislative in nature since it merely approved the Planning Commission's application of existing zoning regulations to plaintiffs' site plan. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 697 N.E. 3d 181, 186 (Ohio 1998). Accordingly, the Ohio Supreme Court found that the referendum as applied to the ordinance approving the plaintiffs' site plan violated Ohio's constitution. *Id.*

Subsequent to the Ohio Supreme Court's decision, defendants again filed motions for summary judgment in federal court. The case was reassigned to Judge Dan Polster on September 8, 1998, after Judge Bell's retirement. On November 29, 1999, Judge Polster issued an order granting the defendants' motions for summary judgment and dismissed plaintiffs' equal protection, Fair Housing Act, and substantive due process claims.

II. LEGAL ANALYSIS

A. Standard of Review

This Court reviews a district court's order granting summary judgment *de novo*. *See Richardson v. Township of Brady*, 218 F.3d 508, 512 (6th Cir. 2000). Summary judgment is appropriate if a party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986). On appeal, we must construe the evidence, and all inferences to be drawn from it, in the light most favorable to the nonmoving party. *See*

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986).

B. Equal Protection

Plaintiffs argue that defendants violated the Equal Protection Clause of the Fourteenth Amendment when they improperly gave effect to the racial bias of their citizens by allowing a referendum to stay the effectiveness of plaintiffs' City Council-approved site plan. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977). Plaintiffs do not have to show that the challenged action rested solely on racially discriminatory purposes. As the Supreme Court stated in *Arlington*:

> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a *motivating factor* in the decision, this judicial deference is no longer justified.
>
> *Id.* (emphasis added).

Determining whether invidious discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564; *see also Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials acting in their official capacity seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority."); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) ("If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection."). Rather than engaging in such a sensitive factual inquiry, Judge Polster held that the defendants did not exhibit racial bias in denying plaintiffs the benefit of the City Council-approved site plan and withholding the building permits because the defendants were simply following the City Charter which required them to stay the effectiveness of any ordinance that is subject to a referendum. J.A at 65-66. This analysis begs the question of whether the public opposition to the housing project was animated by racial bias and whether City officials improperly gave effect to that racial bias by allowing the fate of the project to be decided by referendum.

"The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens." *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1131, 1224 (2d Cir. 1987). In *Hunter v. Erickson*, the Supreme Court held that the implementation

of the majority will through referendum is not immune from judicial scrutiny since the "sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed. 2d 616, 623 (1969); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed. 2d 313, 326 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . ."). Thus, if there is evidence that residents of Cuyahoga Falls were motivated, in part, by racial bias, the City can not give effect to that bias simply because its City Charter provides for referendum. *See Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed. 2d 421, 426 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Dailey*, 425 F.2d at 1039 ("[I]t is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals."). So, the question here is whether the plaintiffs produced sufficient evidence to raise a genuine issue of material fact as to whether the City officials gave effect to a referendum that was motivated, in part, by racial bias.

The Supreme Court in *Arlington Heights* articulated a multi-factored test for determining whether official action was motivated by discriminatory intent. Those factors include: (1) the racial impact of the decision; (2) the historical background of the decision, particularly where it reveals a series of official actions taken for invidious purposes; (3) the specific sequence of events leading up to the challenged decision--including departures from the normal procedural sequence; and (4) the legislative or administrative history--especially

where there are contemporary statements by members of the decisionmaking body, or minutes of its meetings. 429 U.S. at 266-68, 99 S.Ct. at 564-65.

With regard to the first prong--the racial impact of the challenged decision--Judge Polster acknowledged that the staying of the site plan ordinance disproportionately impacted African-Americans. J.A. at 68 ("There is no doubt that the repeal of the Ordinance approving development of a low income housing site had a disparate impact on racial minorities . . . ."). Plaintiffs' expert witness testified that if the 72 unit housing complex were not built, there would be a disproportionate impact on the black population with children since black income eligible households comprise a disproportionately high percentage of the multi-bedroom rental housing market. J.A. at 1309. The second prong--a history of discriminatory actions taken by the state-- is not a factor that cuts either way in this instance.

The third prong--departures from the normal procedural sequence--provides circumstantial evidence of racial discrimination. At the February 21, 1996 Planning Commission meeting, where members of the public voiced their strong opposition to the low-income housing project, Mrs. Hummel, a member of the Commission, remarked that she does not recall any other project where "there was this much scrutiny of a site plan." J.A. at 158. Louis Sharpe testified that there never has been an apartment complex in Cuyahoga Falls' history where a site plan had to face a referendum process except in the plaintiffs' case. J.A. at 1277. The Fourth Circuit in *Smith v. Town of Clarkton*, faced with a similar scenario, stated that "we view as significant the 'opinion poll,' conducted for the first time in the history of the small town of Clarkton immediately after expressions of

racial opposition to the building of housing units surfaced. Such deviations from the procedural norm by governmental decisionmakers in such circumstances are suspect when they lead to results impacting more harshly on one race than on another." 682 F.2d at 1066. Similarly, in the case at bar, the fact that, prior to plaintiffs' project, the City of Cuyahoga Falls had *never* submitted a site plan to a referendum raises a genuine issue of material fact as to whether this deviation from the procedural norm was predicated on racial bias, especially in light of the disproportionate impact the decision had on blacks.

The fourth prong--the administrative history of the decision--also provides circumstantial evidence of racial bias. An examination of the record reveals that a jury could reasonably conclude that public opposition to the plaintiffs' project had a decidedly racial component. At the February 2, 1999 meeting of the Cuyahoga Planning Commission, Lee Minier expressed concerns about safety, commenting that "they know what kind of element is going to move in there." J.A. at 154. Gerry Priobonic, another resident, noted that "there will be a different class of people living there." *Id.* Harry Bridges expressed concerns about safety. *Id.* Susan Brady stated that she does not believe the area will be safe. According to her, "Cuyahoga Falls is downgrading itself." J.A. at 156. Several members of the public questioned Planning Director Sharpe about the height of a fence serving as a buffer between the project and neighboring complexes. Sharpe stated that the fence should not be higher than five feet, having to remind the citizens that the developer is trying to create a residential atmosphere not an institutional one. J.A. at 157. At the March 4, 1996 meeting of the City Council, Amy Bridges expressed concern about the extra

crime and drugs that come with low-income housing. J.A. at 961.

Mayor Robart also voiced his opposition to the project. The Mayor seconded the concerns of those opposing the project, referring in his remarks to the crime problems associated with low- income housing projects. J.A. at 966. The Mayor also linked the project to the same type of "social engineering that brought us busing," which the Mayor considered to be an utter failure. *Id.* Further casting the debate over the project in a racial light, the Mayor referred to an article entitled "Stuck in the Ghetto" which discussed the problems with Section 8 housing. *Id.* Notably, the project at issue does not involve Section 8 vouchers; residents would have to pay the full rent. In any case, the Mayor declared that Cuyahoga Falls has done its part in supporting such projects. At the March 18, 1996 City Council meeting, Mayor Robart forthrightly acknowledged that the issue was not whether the project was properly zoned, but rather the issue was low-income housing. J.A. at 945. The Mayor stated "that people who spent a lot of money on their condominiums don't want people moving in their neighborhood that are going to be renting for $371." *Id.* Thus, the Mayor stated that City Council should not advocate anything that is clearly a step backwards and concluded that "we have to oppose this and we have to oppose it with vigor." *Id.*

Although a number of these statements could be interpreted as opposition to the lower economic status of the potential residents of the project, when viewed in the light most favorable to the plaintiffs, these statements can just as easily be seen as expressions of racial bias against blacks, especially given the fact that racial stereotypes prevalent in our society associate blacks with crime, drugs, and lower

class status. *See* David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 34, 42 (1999) ("[T]he correlation of race and crime remains a stereotype, and most blacks will not conform to the stereotype. Even though blacks are arrested and convicted for a disproportionate amount of violent crime, it is nonetheless true that in any given year only about 2 percent of black citizens are arrested for committing any crime; the vast majority, or 98 percent, of black citizens are not even charged with crime."); Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 Cornell J. Soc. Rel. 1, 10 (1983) (finding strong evidence in a sample of college students of crime- related racial stereotyping, such as perceiving blacks as more likely than whites to commit assault, and other violent crimes). Viewed in the light most favorable to plaintiffs, many of the statements made by Cuyahoga residents evidence a racial bias toward the prospect of a significant number of blacks moving into their community which is 98% white.

At bottom, the circumstances surrounding the opposition to the project, including the comments mentioned above, at least, raise a genuine issue of material fact as to whether the City, in rejecting the ordinance which approved the site plan, gave effect to the racial bias of its citizens.

Judge Polster's refusal to view the evidence contextually through an examination of the factors articulated in *Arlington Heights* stems from his application of the Sixth Circuit's decision in *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986). In *Arthur*, this court held that "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially

motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." *Id.* at 574. [2] It is undisputed that the referendum in this case was facially

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[2] Although we are bound by the Sixth Circuit's decision in *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986), it is by no means immune from our critique. The Court in *Arthur* relied on the Supreme Court's decision in *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed. 2d 896 (1982) in fashioning its unique test for evaluating equal protection challenges to referendums. 782 F.2d at 572 (6th Cir. 1986). An examination of the Supreme Court's decision in *Washington* reveals that its invalidation of an initiative that forbade busing for desegregation purposes would have failed *Arthur's* stringent test. The Sixth Circuit in *Arthur* stated that the only instance when a plaintiff may bring an equal protection challenge to a facially neutral referendum is when the "only possible rationale" animating the citizen's petition is racial bias.782 F.2d at 574. However, in *Washington*, although the Supreme Court acknowledged "that voters were moved to support [the initiative] for 'a number of reasons,' so that 'it is impossible to ascertain all of those reasons or to determine the relative impact of those reasons upon the electorate'" the Court, based on its finding that the facially neutral initiative was effectively drawn for racial purposes, invalidated the initiative. *Washington*, 458 U.S. at 465, 102 S.Ct. at 3192. Aside from contravening Supreme Court caselaw, the decision in *Arthur* also suffers from the following flaw: It eviscerates the use of the Equal Protection Clause of the Fourteenth Amendment in the context of challenging referendums. A plaintiff will almost never be able to prove that racial bias was the "only possible motivation" behind a referendum that otherwise furthers racial discrimination. Moreover, if 95% of the proponents of a hypothetical referendum were motivated by racial bias, the rule in *Arthur* would nonetheless require courts to give effect to the overt racial prejudice of the majority.

neutral and that there were other hypothetical justifications for the referendum apart from racial bias. However, the district court's reliance on *Arthur* is misplaced. To be precise, *Arthur's* holding is based on its conclusion that the *Arlington Height*'s "motivating factor" test does not apply to equal protection *challenges* to referendum elections. *Id.*[3] Thus, *Arthur's* holding is limited to equal protection challenges to referendum elections. In the case at bar, the plaintiffs are not challenging the referendum nor are they seeking to overturn the result of that referendum. [4] Rather, the plaintiffs seek to show that the defendants violated the Equal Protection Clause of the Fourteenth Amendment by giving effect to the racially biased opposition to their project. As Judge Bell pointed out in his opinion below:

> [T]he Court sees a distinction between inquiring into the thoughts of the voter at the voting box, and recognizing the stated motivations of citizens at public meetings and of those who organize and effectuate a petition drive. Where the former would involve the

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[3] The court in *Arthur v. City of Toledo* made it clear that its concern centered on the propriety of overturning the results of facially neutral referendums. 782 F.2d 565, 573 (6th Cir. 1986) ("[T]his court will not lightly set aside the results of voter referendums.").

[4] Indeed, the Ohio Supreme Court has already accomplished that end by finding that the defendants' use of the referendum in this case violated the Ohio Constitution. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls* , 697 N.E. 2d 181, 186 (Ohio 1998) ("The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations . . . is not subject to referendum proceedings.").

> scrutiny of "people acting in a legislative capacity," the latter is simply an attempt to "gather additional information concerning the basis of opposition to the [ordinance]."

Buckeye Cmty. Hope Found., 970 F.Supp at1318 (quoting *United States v. City of Birmingham*, 538 F.Supp. 819, 829 (E.D. Mich. 1982)). The holding in *Arthur* simply does not apply to the facts of this case.

The Sixth Circuit has, on several occasions, found an equal protection violation where city officials gave effect to the race-based opposition of citizens who sought to block low-income housing from infiltrating their predominantly white communities. In *United States v. City of Birmingham*, the district court ruled that a city was liable for its obstruction of a racially integrated housing project where the decision-making body's impedance of the project was a response to the racial animus of a majority of its virtually all-white community. 538 F.Supp. at 828. The court stated:

> The government need not prove that the [decision-making body] itself intended to discriminate on the basis of race in order to establish that the City acted with a racially discriminatory intent. In order to demonstrate a city's racially discriminatory intent, it is sufficient to show that the decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizens. Any other rule of law would permit a legislative body to place its official stamp of approval on private racial

> discrimination.

Id. (citing *United States v. City of Black Jack*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974)). The Sixth Circuit affirmed the district court's determination that the actions of the city had been racially motivated, citing the lower court's findings that unlawful racial motivation was properly inferred from

> the views expressed by a significant number of opponents of [the low-income housing project] (uttered both on the public record and within the hearing of those who testified at trial); a [decision-making body] that knowingly pursued policies that appeased those who expressed these bigoted views . . . [and] the decision to conduct an advisory referendum on the [low-income housing project] . . . .

United States v. City of Birmingham, 727 F.2d 560, 564 (6th Cir. 1984). Furthermore, in *United States v. City of Parma*, the Sixth Circuit affirmed a lower court's invalidation of an ordinance requiring all proposals for low-income housing to be submitted to a voter referendum, finding that the ordinance was racially motivated. 661 F.2d 562, 578 (6th Cir. 1981).

We also find the Fourth Circuit's decision in *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982), to be an instructive case on point. In *Smith*, a black resident of Clarkton, North Carolina sued the city alleging that the city, "bowing to pressure from public sentiment in Clarkton, ordered the town's withdrawal from the multi-municipality [low-income] housing authority, effectively blocking construction of . . . fifty units of housing." *Id.* at 1059. The Court noted that the evidence at trial established that "the actions of the defendants terminating the project resulted

directly from the community's deep felt, intentional, invidious racial animus . . . ." *Id.* at 1065. As in the case at bar, there was evidence that the mayor echoed the concerns of the citizenry in a manner that highlighted the racial nature of the opposition. For instance, there was testimony to the effect that "Mayor Fort was concerned about an influx of 'undesirables.'" *Id.* The Court ultimately found discriminatory intent under the Fourteenth Amendment based on "evidence of . . . statements by citizens, including the defendants, which in a different context might not illustrate racial bigotry, but against the background of . . . considerable opposition to [the housing project] were interpreted by the trial court as 'camouflaged' racial expressions." *Id.* at 1066.

In light of these established principles, it is beyond peradventure that this court may properly view the statements made by residents of Cuyahoga Falls as additional information concerning the basis of the opposition to the proposed housing project. *See Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997) ("Of course, private citizens' motivations and government officials' knowledge of these motivations may be quite relevant to the ultimate issue of the government officials' purposes.").

In sum, plaintiffs have produced sufficient evidence to raise a genuine issue of material fact as to whether (1) the opposition to the low-income housing project reflected racial bias; and (2) whether the defendants gave effect to that racial bias by allowing the referendum to stay the effectiveness of plaintiffs' City Council-approved site plan. Accordingly, the district court erred in dismissing plaintiffs' equal protection claim on summary judgment.

C. Fair Housing Act

The Fair Housing Act ("FHA"), 42 U.S.C. § § 3601, et seq. states that it is unlawful to " make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The standard for finding discriminatory intent is the same under the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment. *See City of Parma*, 494 F.Supp at 1053. Plaintiffs claim that by staying the effectiveness of the site plan ordinance and consequently refusing to grant building permits pursuant to that ordinance, the City intentionally gave effect to the discriminatory anti-minority biases of its citizens and therefore violated § 3604(a) by making dwellings unavailable to potential home builders/buyers based on their race. As noted above, there are genuine issues of material fact as to whether the defendants gave effect to the racial bias of its citizens when they stayed the effectiveness of the site plan ordinance.

Even if plaintiffs fail to prove that defendants intended to discriminate on the basis of race, they also have a valid claim under the FHA on the theory that defendants' actions had a disparate impact based on race. In *Arthur v. City of Toledo*, the Sixth Circuit stated that at least under certain circumstances, a violation of the Fair Housing Act can be established by a showing of discriminatory effect without a showing of discriminatory intent. 782 F.2d at 574-75 (citing *Metro. Housing Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977)). The court enumerated three factors for determining whether conduct which produces a discriminatory effect violates the Fair Housing Act: (1) how strong is the plaintiffs' showing of discriminatory effect; (2) what is the defendants' interest in taking the action complained of; and (3) does the plaintiff seek to compel the

defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. *Id.* at 575 The first prong--the strength of the plaintiffs' showing of disparate impact--supports plaintiffs' claim. Judge Polster acknowledged in his opinion below that there are sufficient facts in the record to conclude that the defendants' actions had a disproportionate impact on blacks. J.A. at 68 ("There is no doubt that the repeal of the Ordinance approving development of a low income housing site had a disparate impact on racial minorities . . . ."). The second prong-- the defendants' interest in taking the action complained of--also supports plaintiffs' disparate impact claim. In particular, we find dispositive the Ohio Supreme Court's decision concluding that the defendants' use of the referendum to deny plaintiffs' the benefit of their site plan violated Ohio's Constitution. *See Buckeye Cmty. Hope Found.*, 697 N.E. 2d at 186. Finally, with respect to the third prong, the plaintiffs did not seek to compel the defendants to affirmatively provide housing for members of minority groups; rather, they sought to restrain the defendants from interfering with the effectiveness of plaintiffs' lawfully approved site plan. Thus, all three factors support plaintiffs' disparate impact claim.

Despite this strong showing of disparate racial impact, plaintiffs cannot prevail unless there are "highly unusual circumstances" present in this case. *Arthur*, 782 F.2d at 575 ("[A]bsent highly unusual circumstances, the discriminatory effect of a referendum cannot establish a violation of the Fair Housing Act."). We find that there are "highly unusual" circumstances present in this case that support a disparate impact analysis. For example, Cuyahoga Falls has *never* used

the powers of referendum to reject a site plan ordinance before this case. An even more unusual circumstance is the fact that the Ohio Supreme Court found that the defendants' use of the referendum to reject plaintiffs' site plan violated the Ohio Constitution. *See Buckeye Cmty. Hope Found.*, 697 N.E. 2d at 186. Certainly, these circumstances are "highly unusual" for purposes of discriminatory impact analysis. In sum, we find that there are genuine issues of material fact as to whether defendants' actions had a disparate racial impact in violation of the FHA.

Plaintiffs also argue that defendants violated their rights under the FHA by giving effect to the anti-family biases of its citizens. *See* 42 U.S.C. § 3604(a) (making it unlawful to refuse to sell or rent or to "make unavailable or deny, a dwelling to any person because of . . . familial status"). An examination of the record reveals that a jury could reasonably conclude that public opposition to the project was also premised on fears that the large influx of children would change the character of the neighborhood. For example, at the March 4, 1996 City Council meeting, resident Larry Hart remarked that he did not feel a five foot fence is sufficient buffer between the retirement community and a complex with over 100 children. J.A. at 954. Lisa Rasko, another resident, commented that she was concerned about the educational quality in the school district; specifically, she worried about the class size with the influx of children. J.A. at 958. At the March 18, 1996 City Council meeting, one resident objected to the project because "[t]here will be . . . kids running around in our yards." J.A. at 949. Finally, James Kuznik, a tester for the Fair Housing Advocates Association, testified that members of the Citizens for the Preservation of Voting Rights--which mobilized support for the referendum--made

statements dealing with children. J.A. at 1359-59. According to Kuznik, "[i]t was the children they were worried about." *Id.* These statements, viewed in the light most favorable to the plaintiffs, evidence an anti-family bias that runs contrary to the clear dictates of the Fair Housing Act. Accordingly, there is a genuine issue of material fact as to whether the defendants gave effect to the anti-family bias of its citizens by staying the site plan ordinance.

In sum, the district court erred in granting summary judgment on plaintiffs' Fair Housing Act claims since there are genuine issues of material fact concerning defendants liability under the FHA which should be resolved by a jury.

D. Substantive Due Process

Plaintiffs contend that the defendants' use of a referendum to deny the effectiveness of their site plan deprived them of substantive due process. In *Pearson v. City of Grand Blanc*, the Sixth Circuit defined substantive due process as "[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed . . . ." 961 F.2d 1211, 1216 (6th Cir. 1992) (quoting Comment, *Developments in the Law--The Constitution and the Family*, 93 Harv L. Rev. 1156, 1166 (1980)). Substantive due process involves the "right not to be subject to 'arbitrary or capricious' action by a state either by legislative or administrative action . . . ." *Id.* at 1217.

In order "[t]o establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally protected property or liberty interest." *Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). "An abstract need or unilateral expectation does not suffice to create a property interest;

rather, a person must 'have a legitimate claim of entitlement.'" *Richardson*, 218 F.3d at 517 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)).

Defendants rely heavily on this court's decisions in *Silver v. Franklin Township, Bd. of Zoning*, 966 F.2d 1031 (6th Cir. 1992) and *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995) to support their claim that the plaintiffs did not have a legitimate claim of entitlement to the approval of their site plan and to the building permits. In *Silver*, a property owner alleged that the township board's denial of a conditional zoning certificate violated substantive due process. 966 F.2d at 1033. We held that because the board had discretion to grant a conditional zoning certificate, the plaintiff "possessed neither a legitimate claim of entitlement to the zoning certificate nor a justifiable expectation that the [b]oard would issue the certificate." *Id.* at 1036. In *Triomphe*, property owners brought suit against city council members alleging that the council's denial of a special use permit violated substantive due process. Relying on our decision in *Silver*, we held that since the city council had discretion to grant or deny plaintiffs' special use permit, the plaintiffs did not have a legitimate claim of entitlement to the permit. 49 F.3d at 203-04. In the case at bar, defendants argue that since site plan approval is discretionary, plaintiffs do not have a legitimate claim of entitlement to the approval of the site plan and therefore do not have a constitutionally protected property interest.

Defendants' reliance on *Silver* and *Triomphe* is misplaced for two reasons. First, in both of those cases, the property owners faced an obstacle not present in the case at bar: the proposed use of their property did not comport with the

existing zoning regulations. Accordingly, in *Silver*, the plaintiff sought a special use permit, and in *Triomphe*, the plaintiffs sought a conditional zoning certificate. In contrast, "the [p]laintiffs are not seeking to change a reasonable zoning restriction, instead they are challenging . . . whether they themselves are allowed to enjoy the rights created by an already-existing zoning scheme." *Buckeye Cmty. Hope Found.*, 970 F.Supp. at 1314. Second, the alleged property interest at stake in both *Silver* and *Triomphe* arose from the failure of the decision-making bodies to approve plaintiffs' proposed use for their respective properties. However, in the case at bar, the City Council actually approved plaintiffs' site plan after having concluded that the site plan conformed with the existing zoning regulations. Thus, the property interest at stake in this case arose from the City Council's approval of plaintiffs' site plan and the alleged substantive due process violation resulted from defendants' use of a referendum to deny plaintiffs the *benefit* of their lawfully approved site plan. One tangible benefit of site plan approval is a building permit which would have allowed construction on the plaintiffs' project to begin. [5]

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[5] Defendants argue that the building permits were properly denied because the plaintiffs had failed to fulfill one of the conditions for granting the permit--namely, building a costly fence on one end of the property. However, as Judge Bell pointed out below, "the facts make it clear that the building of the fence by [p]laintiffs would have been a futile act--what the Sixth Circuit has referred to as 'a waste of time and money. . . . The [d]efendants had already concluded that the building permits could not issue due to the ineffective site plan ordinance." *Buckeye Cmty. Hope Found.*, 970 F. Supp. at 1309 n. 21 (quoting *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1362 (6th Cir. 1992)) (citations omitted); *see also* J.A. at 1269

In light of the property interest at stake, we find this court's decision in *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) to be instructive. In *Nasierowski*, the plaintiff sought to purchase an undeveloped parcel of real estate. *Id.* at 891. Nasierowski's acquisition of the property was made expressly contingent on obtaining an opinion from the city stating that its proposed development was permitted as of right. *Id.* The city so informed Nasierowski, and he purchased the property. *Id.* After Nasierowksi's purchase, however, it became obvious that at least one member of the city council was strongly opposed to the proposed use of the undeveloped land. The city council subsequently approved an ordinance that changed Nasierowki's zoning classification from "general business" to "office development," effectively halting Nasierowski's efforts to develop the property. *Id.* We held that "Nasierowski had a property interest in the old zoning classification within which his development was permitted. That property interest was securely vested by Nasierowski's engagement in substantial acts taken in reliance, to his detriment, on representations from and affirmative actions by the City." *Id.* at 897. Similarly, in the case at bar, plaintiffs' property interest was securely vested upon the City's affirmative representation that the site plan conformed with the existing zoning regulations as reflected by the City's approval, by ordinance, of the site plan.

Having determined that plaintiffs have a cognizable property interest at stake, the next question is whether the defendants are "guilty of arbitrary and capricious action" in

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(testimony of Mr. Boone who stated that work on the fence did not begin "because it became pretty obvious that we are in a fight and . . . we don't have the funds to put up a $70,000 fence.").

denying plaintiffs the benefit of their City Council-approved site plan. *Pearson*, 961 F.2d at 1221. Judge Polster found that the defendants' actions were not arbitrary and capricious because the City was simply following its own law providing for the use of referendum. J.A. at 60. However, the Supreme Court has stated that "[i]f the substantive result of the referendum is arbitrary and capricious . . . then the fact that the voters . . . wish it so would not save the [zoning] restriction." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676, 96 S.Ct. 2358, 2363, 49 L.Ed.2d 132,139 (1976); *cf. Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 716 (6th Cir. 1991) ("The concern is that the voters might 'gang up' to drive out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest. This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent . . . .) (quoting *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984)). Thus, the question remains whether the defendants' actions were arbitrary and capricious.

To prevail on a substantive due process claim, "a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the *strict* sense, meaning that 'there is no rational basis for the . . . [administrative] decision.'" *Pearson*, 961 F.2d at 1221 (quoting *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981)). We find the Fifth Circuit's decision in *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981) to be on point. In *Wheeler*, the developers had a legitimate permit under an existing zoning ordinance to build an apartment complex. *Id.* at 100. However, news of the construction of the apartment complex caused an uproar. *Id.* A referendum was held, which showed an overwhelming resistance to the

proposed apartment complex. The upshot of the referendum was the passage of a new city ordinance which forbade the construction of new apartments. *Id.* The Fifth Circuit noted that if a zoning ordinance is "'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'" it must be struck down. *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)). The Court found that the city's deference to the majority will as reflected in the new ordinance was not rational and therefore violated plaintiff's right to due process. *Id.* Similarly, in *TLC Development Inc., v. Town of Brandford*, a lower court held that:

> A town, through its Commission, cannot arbitrarily refuse to permit a landowner to use land if the proposed use comports with the uses permitted in the district in which the land is located. By articulating the uses permitted in a district, a town has fixed the uses which accommodate all the considerations permitted by the law in adopting a town plan. Once it has done so, a town cannot prevent a permitted use based on factors which might have been, or were, considered in deciding the uses permitted in the zoning district.
>
> 855 F. Supp. 555, 558 (D. Conn. 1994).

Both *Wheeler* and *TLC Development* establish that when a city denies a landowner the benefit of a general zoning scheme, despite its belief and/or knowledge that the landowner's property is entirely consistent with that scheme, it runs afoul of the Fourteenth Amendment's guarantee of due process. Plaintiffs have presented substantial evidence that their proposed complex met all of Cuyahoga's legal

requirements. Planning Director Louis Sharpe testified that "I have no rational reasons whatsoever to say that there is anything wrong with [plaintiffs'] site plan . . . . [T]he plan met the requirements of the City of Cuyahoga Falls in all respects, it exceeded those, and I would find no reason to deny it on a legal or professional basis." J.A. at 722. Mr. Stroup, another member of the Planning Commission, stated that the Commission has an obligation to approve the site plan because it exceeds the zoning requirements. J.A. at 158. Plaintiffs' expert witness, Allen Fonoroff, stated that:

> the public vote rescinding Ordinance No. 48-1996 which had approved the Site Plan for the Pleasant Meadow Apartment Complex was not based on compliance with municipal zoning and land use[] laws of the City of Cuyahoga Falls. Ballot box decision-making exacerbates the problems inherent within traditional zoning decisions. The results are usually more extreme than those decided by local Planning Commissions since the public tends to react and vote their fears and prejudices (namely lowering of property values, introduction of incompatible lifestyles and the tax burden of new children on the local school system) as reasons for denying an appropriate lawful site plan.

J.A. at 737. Fonoroff concluded that there was no rational basis for the rejection of the site plan as it conforms completely with all of the City's regulations. J.A. at 733. Indeed, Mayor Robart forthrightly acknowledged that the issue was not whether the project was properly zoned, but rather the issue was low-income housing. J.A. at 945. While the Mayor's statement may reflect the views of his constituents, it directly contravenes the legal opinion of the

City's own law director, who wrote "[the] rejection [of a site plan] must be based upon those site related factors mentioned in the zoning code." J.A. at 817. Despite being aware that plaintiffs' project was entirely consistent with the zoning code, the defendants allowed a referendum to decide whether plaintiffs' project would go forward. Clearly, plaintiffs have presented sufficient evidence to create a genuine issue of material fact as to whether the defendants, by denying plaintiffs the benefit of the lawfully approved site plan, engaged in arbitrary, irrational, and therefore unconstitutional application of the law in violation of plaintiffs' right to due process. [6]

E. Res Judicata

Defendants also assert that plaintiffs' federal claims are barred by the doctrine of *res judicata* since the federal suit stems from the same transaction or occurrence as the state suit which sought to enjoin the referendum. We find that Judge Bell's exhaustive treatment of this issue below to be persuasive; accordingly, we adopt the lower court's finding that plaintiffs' suit is not barred by *res judicata*. *See Buckeye Cmty. Hope Found.*, 970 F. Supp at 1297-1303.

III. CONCLUSION

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[6] Plaintiffs in their brief also assert a procedural due process claim based on defendants "subjecting them to . . . an extra layer of administrative process--a procedure without clear, rational rules to which they could look for guidance in planning to develop their property." *See* Plaintiffs' Br. at 50. This is actually a substantive due process claim, since the claim essentially amounts to an attack on the rationality of the referendum procedure itself. Therefore, this claim merges with the substantive due process arguments discussed above.

For the foregoing reasons, we find that there are triable issues of fact with respect to plaintiffs' equal protection, Fair Housing Act, and substantive due process claims; accordingly, we **REVERSE** the district court's grant of summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. OHIO,
EASTERN DIVISION
November 29, 1999
No. 5:96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs,

v.

CITY OF CUYAHOGA FALLS, et al.,
Defendants.

JUDGE DAN AARON POLSTER

Before the Court are cross-motions for summary judgment (Doc. Nos. 143, 151).Plaintiffs (collectively, the "Developers") move for partial summary judgment on their substantive due process claims (Counts 2 and 4 of its First Amended Complaint). Defendants move for summary judgment on all claims, *i.e.*, the substantive due process claims, a Fair Housing Act claim (Count 1), and an equal protection claim (Count 3).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ, P. 56(c). All facts and inferences drawn therefrom must be viewed in a light most favorable to the nonmoving party. See *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376,378 (6th Cir. 1993). If, after reviewing the record as a whole, a rational factfinder could not find for the nonmoving party, summary judgment is appropriate since there is no genuine issue for trial. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

I. FACTS

To recount briefly the salient facts of this case,[1] Buckeye Community Foundation("Buckeye") is a nonprofit corporation that develops affordable housing by utilizing low income housing tax credits. The relationship between the plaintiffs has been previously established.[2] In June 1995, Buckeye expressed an interest in developing a low income housing project in the City of Cuyahoga Falls (the "City") to Mayor Don Robart who expressed no objection.

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[1] See *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F.Supp 1289,1292-296(N. D. Ohio 1997) ("Buckeye (federal)") for a detailed account of the facts. Disputed facts will be construed in the plaintiffs' favor.

[2] The parties dispute whether one of Buckeye's prospective contractors and its architect have standing to bring these federal claims. The Court finds that they do not. The relationship between the remaining plaintiffs is set forth at Buckeye (federal), 970 F.Supp. at 1293, 1303-306.

Buckeye thereafter bought the land and began working with the City Planning Director on development details. After the site plan was submitted to the City Planning Commission for review, it was approved subject to certain conditions. One of the conditions required the Developers to erect a fence on one side of the site before the building permit for the apartment complex could issue.

Pursuant to the Charter of Cuyahoga Falls (the "Charter"), the recommendation was presented to the City Council for approval.[3] The Mayor immediately expressed his opposition to the site plan to Council members. Despite his opposition, the site plan was approved — after three Council meetings — in the form of Ordinance No.48-1996 (the "Ordinance") by a six-to-three vote of the City Council on April 1, 1996. Within days, the Developers applied for a building permit. A permit to build the fence was issued later that month; however, the fence was never built.[4]

Parallel to the site plan approval process, a referendum effort was building. The Charter provided that the citizens of Cuyahoga Falls had "the power to approve or reject at the polls any ordinance or resolution passed by the Council."[5] Several referendum meetings were held. The Mayor attended some of them and clearly supported the referendum effort.

On April 30, 1996, referendum petitions with the requisite number of signatures were submitted to the Clerk of City Council who, in turn, certified the petitions to the Summit County Board of Elections (the "Board of Elections"). The

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[3] Charter, Article VIII, Section 1.

[4] Council approval was not necessary to build the fence.

[5] Charter, Article IX, Section 2 (emphasis added).

petitions requested a referendum to approve or reject the Ordinance approving the site plan. On May 1, 1996, the Board approved the referendum.

That same day, the Developers filed an action in state court to enjoin the referendum. They contended that the Ordinance could not be challenged by referendum because its passage by City Council was an administrative act, as opposed to a legislative act. The Developers argued that Section If, Article II of the Ohio Constitution did not grant to citizens referendum powers on administrative actions taken by municipal legislative bodies, and that Council approval of the site plan was an administrative act. Section 1 f, Article II (the "referendum provision") provides,

> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers may be exercised in the manner now or hereafter provided by law.

Id. That referendum provision is the sole constitutional source of referendum powers reserved to municipalities. On May 31, 1996, the Developers' motion for preliminary or permanent injunction was denied on the underlying merits.[6]

On June 20, 1996, the Developers once again requested issuance of a building permit. This request was denied by the City Engineer, who indicated by letter that he could not issue the permit in light of the pending referendum. The Court has previously affirmed this opinion, ruling that various Charter

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[6] The parties agreed that the injunction hearing would be a trial "on the merits."

provisions operated as a freeze on the issuance of a building permit.[7]

On July 5, 1996, the Developers filed this case alleging that the defendants violated housing discrimination laws under the Fair Housing Act and the Equal Protection Clause of the United States Constitution, and denied them substantive due process under the Fourteenth Amendment of the U. S. Constitution. The Developers' motion for a preliminary injunction was denied in November 1996. The voters elected, by referendum, to repeal the Ordinance approving the site plan.

Meantime, the decision of the state court that the referendum was authorized by the Ohio constitution was affirmed on appeal. On May 6, 1998, the Ohio Supreme Court also affirmed that decision, holding by a 4-3 margin that the referendum did not violate the referendum provision of the Ohio Constitution.[8] Two months later, however, upon reconsideration, one Justice changed his opinion and the Ohio Supreme Court reversed itself, holding that the referendum did indeed violate that provision.[9]

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[7] See *Buckeye (federal)*, 970 F.Supp. at 1307-308.

[8] *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 81 Ohio St.3d 559, 692 N.E.2d 997 (May 6, 1998) ("*Buckeye I*").

[9] *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539,697 N.E.2d 181 (Jul. 16, 1998) ("*Buckeye II*"). More specifically, the Supreme Court held that the City Charter provision permitting referenda on all ordinances enacted by the City Council was constitutionally invalid as applied to administrative acts. The City Charter could not bestow upon the citizens of Cuyahoga Falls greater powers than those

On June 20, 1997, the Court granted in part, and denied in part, preliminary summary judgment motions in this case.[10] The second set of summary judgment motions, currently pending, address the only issues that survived the first ruling. Those issues are: (1)whether the City violated substantive due process by certifying the referendum petition and/or refusing to deliver the building permit to the Developers, (2) whether the City violated the equal protection clause based on race, and (3) whether the City violated the Fair Housing Act based on discriminatory intent and/or disparate impact.[11]

At the last status conference on July 26, 1999, the Developers advised the Court that they were proceeding to build the low income housing project.

II. LAW AND ANALYSIS

As a preliminary matter, the Court notes that if the 1996 referendum were to take place *today*, it would clearly violate the referendum provision of the Ohio Constitution under the Ohio Supreme Court's most recent ruling. However, even a properly-authorized referendum can be found to be discriminatory or otherwise violate certain rights under the U.S. Constitution.

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granted by Section If, Article II of the Ohio Constitution. The Court also found that Council could not designate an action as "legislative" simply because it so desired. Rather, it was the nature of the action that determined whether it is legislative or administrative. It concluded that the Ordinance at issue merely formalized an administrative act. *Id.*

[10] The Court's ruling is reported at *Buckeye (federal)*, 970 F.Supp. 1289.

[11] *Id.*

A. Substantive Due Process Claim

Counts 2 and 4 raise the issue of substantive due process. Specifically, Count 2 alleges that the acts of the defendants Clerk of Council and City Engineer were "arbitrary, capricious and unreasonable acts which bear no relation to any legitimate or compelling state interest..." Count 4 alleges that the City officials' acts constituted an unlawful delegation of the zoning power to the electorate. The Developers contend that the City Charter, as applied, operated to deny them due process of law when the City refused to issue them a building permit, after having fulfilled substantially all of the preliminary legal requirements for obtaining one. In other words, the Charter deprived them of their entitlement to the permit in an arbitrary and capricious manner.

In order to sustain a substantive due process claim, the Developers must first show that they had a "legitimate claim of entitlement" to the building permit, or a "justifiable expectation" that they would not be dispossessed of that right. *Silver v. Franklin Township Board of Zone Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). Once established, the Developers must then show that the governmental action denying that right or entitlement was arbitrary or capricious, *i.e.*, that there was no rational basis for the denial. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992).

The Court need not address the preliminary issue of entitlement because the Developers cannot show that any act of a City official or the electorate was arbitrary or capricious, or that the City's failure to issue them a building permit in 1996 was irrational.[12] The undisputed evidence shows that

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[12] The Court is not convinced that the Developers have established that they had a due process entitlement to the building

City Council approved the site plan. The approval of the plan was formalized, as was customary, by ordinance. The Charter permitted referenda on 'all ordinances. ..passed by the Council.' All parties agree that the citizens of Cuyahoga Falls submitted facially neutral referendum petitions with the requisite number of signatures to the Clerk of City Council. Pursuant to the Charter, the Clerk certified the petitions and submitted them to the Board of Elections. The Board of Elections approved the referendum and put the Ordinance to a vote. The Ordinance approving the site plan was thereafter repealed. Until July, 1998, the propriety of the referendum was confirmed by three state courts, including the Ohio Supreme Court.

Additionally, the City was legally prohibited from issuing a permit to the Developers pending the outcome of the referendum. The referendum passed, repealing the Ordinance that approved the site plan, Thus, there was no time (until the Supreme Court reversed itself in July 1998) during which the City had any legal authority to issue a permit to the Developers.

The evidence shows that the City did issue a permit to the Developers to build a fence. Construction of the fence was a precondition to obtaining a permit to build the apartment

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permit simply because Council approved their site plan. Council's approval of the plan was not only discretionary , but conditional .It depended on the fulfillment of numerous conditions, one of which was the building of a fence. Although the Developers have successfully argued (for ripeness purposes) that it would have been fruitless to build a fence under the circumstances, the fact is the fence was never built. Without satisfying all conditions, the Developers are hard-pressed to argue that they were constitutionally entitled to a building permit.

complex, but the fence was never built.[13] Hence, at least one of the conditions for receiving a building permit was never fulfilled. The Court finds that all actions undertaken by the City (and the electorate) have a rational basis in the law.

The Developers allege that it was arbitrary and capricious for the Clerk to certify the petitions to the Board of Elections. In Cuyahoga Falls, when a referendum petition is filed, the Clerk of City Council is required by Charter to submit the same to the Board of Elections.[14] The petitions were facially neutral and they contained the requisite number of signatures. Under the circumstances, it would have been remiss for the Clerk to withhold the petitions from the Board.

Furthermore, it was not evident to anyone in 1996 — let alone the Clerk — that such referenda violated the Ohio Constitution. The City Charter expressly permitted such referenda and there was no reason for the Clerk to think otherwise. Three courts reinforced this assumption — including the Ohio Supreme Court. The fact that the highest state court issued contradictory 4-3 rulings on this issue in less than three months shows just how close this question of state law was. Surely, the Cuyahoga Falls Clerk (or any other City official) cannot be charged with any greater knowledge of the law than the state courts of Ohio.

The Developers also allege that the City Engineer's decision to deny issuance of the permit was arbitrary and

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[13] The Court previously ruled (for ripeness purposes) that the building of a fence would have been futile, *i.e.*, an unnecessary prerequisite to filing this lawsuit. This finding, however, does not change the fact, for due process entitlement purposes, that the fence was never built.

[14] Charter, Article IX, Section 2.

capricious. The Court has already ruled that the City was without authority to issue the building permit.[15] Moreover, the Engineer sought advice from the Law Director before refusing to issue the permit. The Engineer simply relayed the information the Law Director gave to him to the Developers. The Court finds that the City Engineer's refusal to issue the permit pursuant to the Charter and the advice of counsel was neither arbitrary nor capricious.

Judge Bell previously found that the evidence did not support the Developers' assertions that the Mayor organized the petition drive, secured meeting places for the citizen group opposed to the project, certified the petition, or submitted the referendum question to the Board of Elections.[16] Plaintiffs have provided no additional evidence otherwise.[17] Even if plaintiffs could establish that the Mayor was the force behind the referendum, however, there is no evidence that the Mayor had any legal authority to issue a permit.

The Developers ultimately rest on the purely legal argument that, because the referendum was unauthorized under state law, there was no rational legal basis for the acts of City officials in refusing to issue a building permit.[18] In other words, because Council's approval of the site plan could

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[15] See *Buckeye (federal)*, 970 F.Supp. at 1307-308.

[16] *Id.*, 970 F.Supp. at 1321.

[17] Plaintiffs allege that the Mayor may have made a City building available for a referendum meeting. This unsupported allegation is insufficient to make this due process claim survive summary judgment.

[18] See Plaintiffs' Motion for Partial Summary Judgment, Doc. No. 143.

not be put to popular vote, the Developers were entitled to a building permit. The Court disagrees. The Developers were not entitled to a permit to build the apartment complex until they satisfied all the requisite conditions. Granted, the referendum frustrated the Developers' incentive to fulfill those conditions, but there is no factual dispute that all conditions were not met.

The Supreme Court's after-the-fact decision that the 1996 referendum was not authorized under the Ohio Constitution does not automatically turn the acts of the electorate, the Clerk, the City Engineer, or the Mayor into violations of substantive due process under the United States Constitution. Such claims require irrational conduct, and the Developers have failed to establish a factual issue regarding the reasonableness of the City's actions — notwithstanding the opinion of an expert to the contrary .

Based on the undisputed evidence, the Court finds that it was neither arbitrary nor capricious for the electorate to bring the referendum, for the City to certify the petitions to the Board of Elections, or for the City to refuse to issue the building permit. Thus, the Court dismisses the substantive due process claims as a matter of law. If the defendants' conduct in this case is to be found actionable at all, it must be shown to be discriminatory.

B. Equal Protection Claim - Intentional Discrimination

Plaintiffs claim that defendants violated the Equal Protection Clause of the United States Constitution on the basis of race. The United States Supreme Court articulated the prerequisites for bringing such a claim:

> [O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate

> impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. ' Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection clause.

Village of Arlington Heights v .Metropolitan Housing Development Co. 429 U.S. 252, 264-65(1977) citing *Washington v. Davis*, 426 U.S. 229 (1976). All parties agree that a showing of discriminatory intent on the part of *City officials* is necessary for the Plaintiffs to prevail on their equal protection claim. The only officials whose actions are at question here are those of the Mayor, the Clerk of City Council, and the City Engineer.

The Sixth Circuit has held that the following four factors are probative of racially discriminatory intent:

> (1) the racial impact of an official action;
>
> (2) the historical background of the decision;
>
> (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and substantive norms; and
>
> (4) the legislative or administrative history of the decision.

United States v. City of Birmingham, Mich., 727 F.2d 560,565 (6th Cir. 1984).

Importantly, a district court cannot inquire into the electorate's motivations in an equal protection clause context "absent a referendum which discriminates facially, or one where although facially neutral, the only possible rationale is racially motivated." *Arthur v. City of Toledo*, 782 F.2d

565,573 (6th Cir. 1986) (emphasis added).[19] Policy considerations limit a court's examination of the factors motivating the electorate in a referendum election, *e.g.*, the difficulty of ascertaining the electorate's motivations and the fact that "the bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis." *Clarke v. City of Cincinnati*, 40 F.3d 807,815 (6th Cir. 1994) (citations omitted).

All parties agree that the referendum at issue was facially neutral. The Court now finds that racial discrimination, if present, was not the only possible explanation for the 1996 referendum. It is quite possible that the citizens of Cuyahoga Falls may have demanded the referendum for, *inter alia*, safety or economic reasons. This is in fact borne out by the testimony of referendum proponents.

One supporter was concerned about the location of the development. He testified that access to the site was inadequate and that fire trucks might not be able to get in to the development in the winter.[20] Another argued that a newly-opened school did not have enough capacity for the anticipated number of new students the development would bring.[21] A third supporter, noting that he had just paid an

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[19] See also *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 128 F .3d 289, 293 (6th Cir. 1997) (in reviewing district court decisions, "[the Sixth Circuit] may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative or referendum.Instead, the court must consider all hypothetical justifications which potentially support theenactment.").

[20] William Suren Deposition, p. 33.

[21] Frank Pribonic Deposition, pp. 54-55.

additional $300/year in real estate taxes for a recently-passed levy, testified that he could not afford another levy to alleviate the impact on the school system.[22] Because there are rationales other than racial discrimination that may have (and did in fact) motivate the voters, the Court may not 'inquire into' the entire electorate's motivations in petitioning for the referendum. *Arthur*, 782 F.2d at 573.

The issue, then, is whether city officials intended to discriminate on the basis of race by submitting the referendum petitions to the Board of Elections, or by withholding the building permit from Buckeye. The Court finds that plaintiffs have provided absolutely no evidence that the Clerk or City Engineer had any racial animus in carrying out their ministerial functions. Thus, the Court will focus solely on the conduct of the Mayor.

The undisputed evidence shows that Mayor Robart opposed the site plan and voted against it at the City Council meeting. Plaintiffs contend that the Mayor's support of the referendum was motivated by racial discrimination — citing a statement he made at the March 18, 1996 City Council meeting:

> [T]he issue is low income housing ...That is the whole issue here. Density is not an issue here.[23]

At the March 4, 1996 Council meeting, the Mayor talked about an article called "Stuck in the Ghetto" and discussed the

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[22] Lee Minier Deposition, p. .26.

[23] Minutes of March 18, 1996 Cuyahoga Falls City Council Meeting.

effect of busing on Cleveland's schools.[24] He discussed how Cuyahoga Falls had "done [their] part off Graham Road," referring to the only Cuyahoga Falls development with a substantial number of African Americans.[25]

The Court is aware of no law that prohibits the Mayor from expressing his opinion in Council meetings, or requires him to cast his Council vote a certain way. Obviously, the Mayor's opinion did not hold much weight with Council because the plan was approved despite his opposition. The Court finds that the Mayor's isolated, obscure comments made within the context of a Council meeting are insufficient as a matter of law to show racial animus, and had no bearing *in fact* on Council's approval of the site plan.

The undisputed evidence also shows that the Mayor supported the referendum effort. However, there is no law prohibiting the Mayor from supporting the referendum, and the plaintiffs have provided no evidence that he made discriminatory comments at any referendum support meetings. Indeed, a Fair Housing Advocacy "tester" sent to one of the meetings to detect discrimination testified that Robart made no discriminatory comments at all.[26]

Assuming the Mayor did have a racial animus, there is no evidence that he was responsible for certifying the petitions or denying the building permit. The undisputed evidence shows that the Clerk submitted the petitions to the Board of Elections, and the City Engineer denied issuance of a building

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[24] See Reply of Plaintiffs to Defendants' Motion for Surnrnary Judgment, pp 3-4.

[25] *Id.*

[26] November 19, 1996 Hearing Transcript ("Tr."), p. 300.

permit. There is no evidence that the Mayor had any authority to carry out these administrative tasks or that he had a hand in facilitating them.

In short, the undisputed facts show that City Council approved the site plan over the Mayor's opposition, that the Clerk properly submitted the referendum petition to the Board of Elections, and that the City properly refused to issue the building permit to Buckeye.[27] Because the Developers have failed to raise a material factual question on the issue of intentional racial discrimination, the equal protection is dismissed as a matter of law.

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[27] These facts are completely distinguishable from *United States v. City of Birmingham*, 538 F .Supp. 819 (E.D. Mich. 1982)., aff'd 727 F.2d 560(6th Cir. 1984}wherein the City of Birmingham took active steps to subvert a similar project, such as putting contractual roadblocks in the way of Council approval, holding a voluntary referendum requested by voters who were clearly opposed to the project for racial reasons, and then honoring the inevitable outcome. Here, City Council approved the site plan by ordinance, which the Mayor did not veto. The City of Cuyahoga Falls later honored a mandatory referendum permitted under City Charter. (Although *Birmingham* involved a discrimination claim brought under the Fair Housing Act, the standards for proving intentional discrimination under that Act and the Equal Protection Clause are the same.)

C. Fair Housing Act

Under 42 U.S.C. 3604(a), it is unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id*. This section applies to municipalities. *United States v. City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981). Plaintiffs argue that the City intentionally discriminated against families and racial minorities, and that the referendum was discriminatory because it had a disparate impact on racial minorities and families with children.

i. Intent to Discriminate

There is no distinction between the elements of a housing discrimination claim, based on discriminatory intent, under the Equal Protection Clause or the Fair Housing Act. See, *e.g., Village of Arlington Heights*, 429 U.S. at 265-66,97 S.Ct. at 563. The Court finds that the plaintiffs have provided no evidence that City officials discriminated against families by submitting the petition to the Board of Elections or denying the permit. For this reason and the reasons set forth with respect to intentional racial discrimination under the equal protection claim, *supra*, pp. 10-14 , the Court finds that the Developers have failed to raise a material factual issue with respect to intentional discrimination under the Fair Housing Act.

ii. Disparate Impact

Under limited circumstances, a violation of the Fair Housing Act can be established by showing discriminatory impact without a showing of discriminatory intent. *Metropolitan Housing Development Corp. v. Village of*

Arlington Heights, 558 F.2d 1283, 1290(7th Cir. 1977). The Court must consider three factors:

> (1) the strength of the plaintiffs showing of discriminatory effect;
>
> (2) the defendant's interest in taking the action complained of; and
>
> (3) the plaintiffs goal, *i.e.*, whether it is to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.
>
> *Arthur v. Toledo*, 782 F.2d 565,575 (6th Cir. 1986).

The third factor requires the Court to examine the goals of the plaintiffs in bringing this case. The Court will not question the motives of the Developers in litigating this action. Their perseverance in vindicating their rights under Ohio law can only be commended.

The first factor requires the Court to assess the discriminatory effect of the referendum. There is no doubt that the repeal of the Ordinance approving development of a low income housing site had a disparate effect on racial minorities and families with small children. The mission of the Buckeye Community Foundation is to provide affordable housing to persons in low income brackets. Racial minorities and families with small children constitute a significant portion of that bracket. If this fact alone was sufficient to prove a disparate impact claim, however, every denial of a permit to construct low income housing would necessarily violate the Fair Housing Act.

Regarding the second factor, the importance of the

referendum as a means of democratic process is beyond question.

The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'

Eastlake v. Forest City Eng., Inc., 426 U.S. 668,672-73 (1976) (citations omitted). Given the strong policy considerations underlying referenda, the Sixth Circuit has held that the discriminatory effect of a referendum cannot establish a violation of the Fair Housing Act "absent highly unusual circumstances." *Arthur*, 782 F.2d at 575.

The Court has ruled that submission of the referendum petition to the Board of Elections and denial of the building permit were ministerial acts that were mandated by law. The Developers have failed to establish a material factual issue regarding the discriminatory intent of the City officials. Although plaintiffs have provided evidence that supporters of the referendum made discriminatory comments at organizational meetings, the undisputed evidence shows that over 20,000 people voted on the referendum. Again, the bigoted comments of a few voters cannot be imputed to the entire electorate or to the City. *Arthur*, 782 F .2d at 573- 74 (citations omitted). The Court finds that the Developers have failed to establish the presence of highly unusual circumstances.

Given the disparate effect of the referendum and the good

intentions of the Developers in pursuing their legal rights, it is the utter failure of plaintiffs to establish highly unusual circumstances on the part of the City that requires dismissal of the disparate impact claim under the Fair Housing Act.

III. CONCLUSION

Today, it is clear that City Council's approval of the plaintiff's proposed site plan could not be put to popular vote under the Ohio Constitution, and that plaintiff's project should have gone forward in 1996. However, plaintiffs have failed to show that the defendants' conduct violated any of the federal claims alleged. Accordingly, summary judgment is granted in defendants' favor on all counts of the complaint.

IT IS SO ORDERED.

Dan Aaron Polster
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT,
N.D. OHIO,
EASTERN DIVISION
June 20, 1997

No. 5:96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs,

v.

CITY OF CUYAHOGA FALLS, et al.,
Defendants.

Diane E. Citrino, Housing Advocates, Inc., Cleveland, OH, Edward G. Kramer, Kramer & Nierman, Cleveland, OH, for Buckeye Community Hope Foundation, Cuyahoga Housing Partners, Inc., Buckeye Community Three L.P., Fair Housing Contact Service.

Virgil E. Arrington, Jr., City of Cuyahoga Falls, Department of Law, Cuyahoga Falls, OH, for City of Cuyahoga Falls, Gregg Wagner, Gerald M. Dzurilla.

Virgil E. Arrington, Jr., City of Cuyahoga Falls, Department of Law, Cuyahoga Falls, OH, Jack Morrison, Jr., E. Marie Wheeler, Steven W. Mastrantonio, Amer,

Cunningham, Brennan, Akron, OH, for Don Robart.

William E. Schultz, Office of the Prosecuting Attorney, Akron, OH, for Summit County Bd. of Elections.

Roger Gupta, Munroe Falls, OH, pro se.

ORDER

SAM H. BELL, District Judge.

The above-captioned matter came before this Court on the filing of a Complaint by Plaintiffs Buckeye Community Hope Foundation ("Buckeye"), Cuyahoga Housing Partners, Inc., Buckeye Community Three L.P., and the Fair Housing Contact Service, in which they requested injunctive relief from what they alleged to be violations of rights guaranteed by the Constitution's Due Process and Equal Protection Clauses, as well as violation of those rights protected by federal fair housing laws. On November 19-21, 1996, the Court conducted a hearing and took evidence regarding Plaintiffs' request for a preliminary injunction. Ultimately, the Court approved an injunction stipulated to by the parties which enjoined the Defendant Summit County Board of Elections from certifying the results of a referendum concerning the Plaintiffs' ability to build low-income housing on land in Cuyahoga Falls. (Docket # 68.) However, because the Court found there to be no showing of irreparable harm to Plaintiffs, their request for an injunction ordering the Defendant City of Cuyahoga Falls to issue building permits was denied. (Docket # 78.) In the Order denying Plaintiffs' preliminary injunction request, the Court deferred consideration of the merits of the underlying causes of action, concluding that such consideration would be more

appropriately addressed after evaluating the Defendants' motions for summary judgment. The Court then referred those motions to Magistrate Judge James D. Thomas for a report and recommendation.

Presently before the Court is the report of the Magistrate, in which he recommends that this Court grant the motions for summary judgment filed by Defendants the City of Cuyahoga Falls, Mayor Don Robart, Clerk of City Council Gregg Wagner, and Chief Engineer Gerald M. Dzurilla. While Defendants largely agree with the Magistrate's analysis or conclusions, Plaintiffs' objections are numerous and weighty. (*See* docket # s 88, 89, 90.) Since the issuance of the Magistrate's Report and Recommendation, this Court requested the parties to address three questions raised by their briefs and objections, (docket # 94), and they readily complied (docket # s 95 & 98). The issues having thus been well-framed, the Court now issues its opinion.

I. Background.[1]

There are two areas of background relevant to the consideration of the pending motions: (1) the facts leading up to the proposed development, referendum and filing of this action; and (2) the procedural context of this action. The two areas are discussed below. Initially, however, one procedural matter warrants an introduction here.

As mentioned above, this Court conducted a three day hearing on Plaintiffs' motion for preliminary injunction in

[1] This Background section is taken, with only minor changes, from the thorough and well-documented corresponding section of the Magistrate's report. (Docket # 86, part II, at 2-15.)

November of 1996. This was the second hearing on Buckeye Community Hope Foundation's request for injunctive relief; a preliminary injunction hearing was also held in the state action. Plaintiffs' motion for injunctive relief filed in this Court was denied on December 13, 1996. (Docket # 78.) On the motion of Plaintiffs, the transcript of those proceedings has been accepted for consideration in connection with the pending motions for summary judgment. (*See* Order of January 22, 1997, Docket # 84.) The Magistrate relied on portions of the three volume transcript in his report, and this Court will also consider that evidence insofar as it is relevant to the motions now before the Court.

Plaintiff Buckeye Community Hope Foundation ("Buckeye Community Foundation") is a not-for-profit 501(c)(3) corporation. (Hearing Transcript, November 19, 20, and 21, 1996 ("Tr.") at pp. 11-13.) It has as its purpose the development of affordable housing through the use of low income housing tax credits. (*Id.*) Mr. Boone is the President of the Board of Trustees for Buckeye Community Foundation. (Tr. at p. 11.)

Prior to the development of the complex in question here, Buckeye Community Foundation developed at least four other affordable housing complexes in Ohio. (Tr. at p. 15.) As outlined at the hearing before this bench by Mr. Boone and the Executive Director for Buckeye Community Foundation, Mr. P. Barno, Buckeye Community Foundation acts as a developer for each project. (Tr. at p. 389.) For each project, a separate limited partnership is formed as the investment vehicle to sell the tax credits. In this case, the specific limited partnership is Plaintiff Buckeye Community Three, L.P. ("Buckeye Three Limited"). (Tr. at p. 23.) The limited partnership is the owner of the land and, once it is completed,

the development. As the project is developed, Buckeye Community Foundation advances fees and expenses until all the financing, including the tax credits, are finalized.[2] Once the complete financial package is arranged and finalized, Buckeye Community Foundation is reimbursed for its expenses in developing the project. Buckeye Community Foundation also receives a "developer's fee" for its services. In this case, the expected fee is $175,000.00. (Boone Dep. at p. 120; Tr. at p. 381.)

To protect each development and its investors, Buckeye Community Foundation forms a separate corporation to act as the general partner for the limited partnership. (Tr. at pp. 22-23.) In this case, Plaintiff Cuyahoga Partners, Inc. ("Cuyahoga Partners"), a for-profit corporation, was formed to serve as the general partner of Buckeye Three Limited.[3] (Tr. at p. 23.) Mr. Boone is the president of Cuyahoga Partners. (Boone Dep. at pp. 6-7.) Buckeye Community Hope Foundation is a fifty-one percent owner of Cuyahoga Partner, and the, other forty-nine percent is owned by Little Country Community, Inc., another 501(c)(3) corporation. (Tr. at p. 396.) Thus, Buckeye Community Foundation controls Cuyahoga Partners which in turn controls Buckeye

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[2] For example, in this case the $10,000 loan commitment paid to the bank by Buckeye Three Limited was advanced by Buckeye Community Hope Foundation. (Tr. at p. 397.)

[3] The initial limited partners were RLJ Management Company and/or Steven Boone individually. (Tr. at p. 398.) RLJ Management Company is "a management company that manages affordable housing in Ohio and elsewhere." (Boone Dep. at p. 7.) There is an "understanding" that RLJ Management Company would manage the complex if it were built. (Tr. at p. 398.) RLJ Management is owned by Mr. Boone. (*Id.*)

Three Limited.[4] (Tr. at pp. 23, 389-390.)

Turning to the events leading to the underlying dispute, Mr. Boone testified that he first contacted the Mayor for the City of Cuyahoga Falls, Don Robart, in the summer of 1995 about the possibility of developing a low income housing complex in Cuyahoga Falls.[5] Mr. Boone testified that Hearing Exhibit 23 represents a letter from Buckeye Community Foundation to Mayor Robart dated June 7, 1995. In the letter, Buckeye Community Foundation expressed an interest in developing the land "under the low income housing tax credit program." (Tr. at pp. 20-21.) Mr. Boone indicated that this letter was sent before the purchase of the land for the project. (Tr. at p. 21.) According to Mr. Boone, the Mayor expressed no problems about the proposed development at that time. (*Id.*)

The real property, located on Pleasant Meadow Boulevard, was purchased on June 12, 1995. (Complaint at ¶ 13.)

Mr. Boone testified that he started working with Cuyahoga Falls Planning Director, Louis Sharpe, in late August/September of 1995 on the details of the development. (Tr. at pp. 30-31.) The financing for the project was secured in November of 1995. (Tr. at p. 21.)

In January, 1996, Buckeye Three Limited, filed an application for a "site plan review" for the seventy-two unit apartment complex in the City of Cuyahoga Falls.

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[4] Because of the commonality among these parties, at times they are referred to collectively as "Plaintiff Developers."

[5] Don Robart is named as a defendant in this action both in his individual and official capacities.

(Complaint at ¶ 15.)

On February 21, 1996, the "site plan" was submitted for approval at a meeting of the Planning Commission for Cuyahoga Falls. (Complaint at ¶ 17; Tr. at p. 33.) In connection with the Planning Commission's meeting, Planning Director Sharpe prepared a Staff Summary of the site plan. (*See* Hearing Exhibit 11; Tr. 128.) This summary recommended approval of the site plan subject to approximately nine conditions agreed to by Mr. Boone. One of the conditions required the developers to erect a fence on one side of the property before the building permit for the apartment complex could issue.

The site plan, including the conditions, was unanimously approved by the Planning Commission at the February 21, 1996 meeting.[6] (Complaint at ¶ 17; Tr. at p. 35.) The Planning Commission's recommendation then had to be submitted to and approved by City Council. (*Id.*) Mayor Robart did not attend the February 21, 1996, Planning Commission meeting. (Tr. at pp. 72-73.)

On March 4, 1996, the Planning Commission's recommendation on the site plan was addressed at a City Council meeting. (Tr. at p. 35.) Mayor Robart attended this meeting. (Tr. at p. 36.) According to Mr. Boone, Mayor Robart "came out against" the project during this meeting and suggested that the issue be tabled. (Tr. at p. 39-40.) The

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[6] Hearing Exhibit 11 sets forth the conditions prerequisite to the issuance of the building permit as approved by the Planning Commission and as adopted by City Council. (Tr. at p. 90.)

issue was tabled.[7] (Tr. at p. 40.)

Another meeting of City Council was held on March 18, 1996. (Tr. at p. 40.) From a review of the materials filed in connection with the motions, one can conclude that this meeting was long and emotional. The minutes reflect that the meeting lasted from 6:15 p.m. until 8:45 p.m. and that several residents expressed their concerns over the development of the complex. Mayor Robart attended the March 18, 1996 meeting and expressed his views in a lengthy statement. (Hearing Exhibit 24 at pp. 12-14.)

According to Mr. Boone, Mayor Robart recommended rejecting the project at the March 18, 1996 Council meeting. (Tr. at p. 43.) The issue was tabled again. Mr. Boone testified, "I believe they said the reason was because they wanted the law department to provide a legal opinion if there was any possible reason, the way it was put, that they could turn us down legally." (Tr. at p. 43.) Mr. Boone acknowledged that he raised the Fair Housing Act at the March 18, 1996 meeting. (Tr. at p. 60; Boone Dep. at p. 16.)

Another Council meeting occurred on April 1, 1996, and the site plan was approved by vote of six to three, with two abstentions. (Complaint at ¶ 19; Tr. at p. 43.) The City Council's approval was expressed in the form of Ordinance No. 48-1996. Ordinance No. 48-1996 states, in pertinent

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[7] Mr. Boone indicated that while he was not aware of any referendum being considered, he recalled the word being used by the City Law Director at either the March 4 or March 18 City Council meeting. (Tr. at pp. 41-42.) Mr. Boone testified that the word referendum "went right over my head" and he did not understand what a referendum was until April. (*Id.*)

part:

> That this City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-6-96-SP.
>
> (Hearing Exhibit # 8, Section 1.)

Mr. Boone testified that they applied for the building permit about two days after the site plan was approved. (Tr. at p. 44.) Upon direct questioning by the Court, Mr. Boone stated that the application was made on either April 3 or 4. (*Id.*) The complaint alleges that the building permit was sought on or about April 5, 1996. (Complaint at ¶ 29.)

Mr. Boone testified that they received the building permit for the fence in April, 1996. (Tr. at pp. 46-48.) Mr. Boone testified that work on the fence did not begin "because it became pretty obvious that we are in a fight, and I wasn't about to--first of all, we don't have the funds to put up a $70,000 fence. If we know we are going to receive with assurity the building permit to build the rest of the project, I--that's basically the reason." (Tr. at p. 48.) Mr. Boone further stated that he did not proceed with building the fence because "the rumors of a referendum were very prevalent." (Tr. at p. 92.) He testified, "I felt the reasonable thing to do was to delay the construction of the fence until I was assured we were going to get a building permit." (Tr. at p. 92.)

Parallel to the site plan approval process, a referendum

effort was proceeding. (*See* Complaint at ¶ 24.)

Mr. Lee Minier is a life long resident of Cuyahoga Falls, Ohio. (Tr. at p. 266.) He was called by Plaintiffs to testify at the preliminary injunction hearing. Mr. Minier testified that Hearing Exhibit 19 is a notice for meeting on Tuesday, April 9, 1996 to discuss "taking the ISSUE OF A 72 UNIT HOUSING DEVELOPMENT ON PLEASANT MEADOW BLVD. to the vote of the people of Cuyahoga Falls in November." (Hearing Exhibit 19) (upper case print in original) (Tr. at p. 278-279.) The organizing group, as identified on Hearing Exhibit 19, was the "Citizens for the Preservation of Voters Rights." (*See* Exhibit 19.)

Mr. Minier attended the April 9, 1996 meeting. The Mayor also attended the meeting. (Tr. at p. 279.) The Mayor spoke at the meeting and stated that he supported the referendum effort. (*Id.*) According to Mr. Minier, no City of Cuyahoga Falls officials were asked to sign the referendum petitions. (*Id.*)

Mr. James Kuzmik, a "tester" for the Fair Housing Advocates Association, also attended the April 9, 1996 meeting. (Tr. at p. 291.) According to Mr. Kuzmik, the director of Fair Housing Advocates Association called him and asked him to attend the meeting.[8] (*Id.*) Mr. Kuzmik testified that the referendum process was discussed at this meeting. Mr. Kuzmik was asked, "were there any statements made by members of the Citizens for the Preservation for Voter [Rights] dealing with children?" Mr. Kuzmik said yes.

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[8] Mr. Kuzmik is not a member of Fair Housing Contact Services. (Tr. at p. 291.) Fair Housing Advocates Association is a distinct entity separate and apart from Plaintiff Fair Housing Contact Service.

(Tr. at p. 293.) Mr. Kuzmik said he did not recall any one person leading the meeting. (Tr. at p. 296.) On cross examination, Mr. Kuzmik stated that he did not hear Mayor Robart make any discriminatory remarks about African Americans or children at the April 9, 1996 meeting.[9] (Tr. at p. 300.)

On or about April 29 or 30, 1996, a referendum petition was submitted to the Clerk of Council, Gregg Wagner.[10] (Complaint at ¶ 25; Wagner Affidavit at ¶ 5.) The Board of Elections approved the referendum petition on May 1, 1996. (Complaint at pp 25 and 26; Wagner Affidavit at ¶ 5.)

On May 1, 1996, the state action was filed to enjoin the referendum process under Ohio law. The case was captioned: *Buckeye Community Hope Foundation, et al. v. City of Cuyahoga Falls, et al.*, Case No. CV96-05-1701 (Summit County) (Murphy, J.). The named plaintiffs were Buckeye Community Foundation, Cuyahoga Partners, and Buckeye Three Limited, three of the four named plaintiffs in this action. (See "Complaint for Temporary Restraining Order Declaratory Judgment Injunctive Relief," Docket # 33, Exhibit C.) The state court complaint named as defendants: (1) City of Cuyahoga Falls; (2) Cuyahoga Falls City Council; (3) Gregg Wagner, Clerk of City Council, City of Cuyahoga Falls; and (4) Summit County Board of Elections. (Docket # 33, Exhibit C.) With the exception of the Cuyahoga Falls City Council, the same defendants have been named in this action.

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[9] Mr. Kuzmik's handwritten notes taken during the meeting are at Hearing Exhibit 32. (Tr. at p. 298.)

[10] Mr. Wagner is named in this lawsuit as a defendant in his official capacity as the Clerk of Council.

On May 15, 1996, Judge Murphy conducted a hearing on plaintiffs' request for preliminary injunction. (Docket # 33, Exhibit F.) At the hearing, plaintiffs presented the testimony of three witnesses: (1) Mr. Boone; (2) Joseph James Orel, President of JJO Construction, the contractor for the project; (Docket # 33, Exhibit F, p. 13); and (3) Roy Lowenstein, a representative of Ohio Capital Corporation for Housing. (Docket # 33, Exhibit F, p. 17.) Mr. Boone and Mr. Orel also testified at the hearing in November, 1996.[11] (Tr. at pp. 11-106; pp. 109-121.) The plaintiffs in that action were represented by Edward G. Kramer, who represents Plaintiffs in this action as well. (Docket # 33, Exhibit C.)

On May 31, 1996, Judge Murphy denied the plaintiffs' motion for preliminary or permanent injunction.[12] (Docket #

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[11] Several other witnesses testified at the hearing including Louis Sharpe (Tr. at pp. 121-158), Sandra Montgomery (Tr. at pp. 158-164), Crystal Williams (Tr. at pp. 165-169), Kathy Ronca (Tr. at pp. 169-180), Julia Neal (Tr. at pp. 180-185), Gerald Dzurilla (Tr. at pp. 186-198), Dr. Mark Sailing (Tr. at pp. 201-252), George Potts (Tr. at pp. 253-266), Lee Minier (Tr. at pp. 266-288), James Kuzmik (Tr. at pp. 289-300), Don Robart (Tr. at pp. 301-338), and Peter Gilbertson Barno (Tr. at pp. 359-404.) The testimony of each witness has been read and considered by the undersigned. The relevant testimony is discussed *infra* to the extent necessary.

[12] Plaintiffs appealed Judge Murphy's decision and on December 11, 1996, the Ninth Appellate District affirmed the decision of the trial court. On March 26, 1997, the Ohio Supreme Court allowed Plaintiffs' appeal, but as of the time of this order, no

33, Exhibit B.) The decision and judgment was "on the merits." (Docket # 33, Exhibit F, pp. 48-49; *see also,* Attachment to Docket # 77--Ninth Appellate District's December 11, 1996 opinion at p. 3 ("The parties agreed to consider the hearing as a trial on the merits of the case.")).

On June 20, 1996, Mr. P. Gilbertson Barrio, Buckeye Community Foundation's Executive Director wrote to the City of Cuyahoga Falls and renewed his request for issuance of a building permit. (Hearing Exhibit # 16.) On June 26, 1996, Mr. Gerald M. Dzurilla, the City Engineer for Cuyahoga Falls, sent a letter to Mr. Barno and indicated that he could not issue the building permit in light of the pending referendum.[13] (Complaint at ¶ 31; Hearing Exhibit # 15.)

Plaintiffs filed the present action on July 5, 1996, naming as Plaintiffs the three plaintiffs in the state court action, plus one new plaintiff, the Fair Housing Contact Service. The Defendants in this action are: (1) City of Cuyahoga Falls; (2) Don Robart, in his individual and official capacity as Mayor of the City of Cuyahoga Falls; (3) Gregg Wagner, in his official capacity as Clerk of City Council; (4) Summit County Board of Elections; and (5) Gerald M. Dzurilla, in his official capacity as Chief City Engineer. (Docket # 1.) The new Defendants, i.e., those not named in the prior state suit, are Mayor Robart in his individual and official capacity, and Mr. Dzurilla in his official capacity.

In contrast to the complaint filed in state court, the complaint filed in this Court is based upon federal law. The

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opinion has been rendered.

[13] Gerald Dzurilla is named in this lawsuit as a defendant in his official capacity as "Chief City Engineer."

Plaintiffs allege violations of 42 U.S.C. §§ 3601 *et seq.*, 3604, and 3617, 42 U.S.C. §§ 1981 and 1982 (Docket # 1, ¶ 37); the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 (pp 39, 44); and the Equal Protection Clause of Fourteenth Amendment and 42 U.S.C. § 1983 (¶ 41). Plaintiffs ask this Court to grant them declaratory judgment, to grant an injunction ordering the Defendant City and its officers and agents to issue building permits to the Plaintiff Developers, to enjoin the Defendants from imposing additional burdens on the planning and construction of the development, and to order Defendants to pay compensatory and punitive damages and costs. (Docket # 1, part VI, pp 2-7.) Originally, the complaint also sought to enjoin the Defendants from placing the referendum on the ballot, (docket # 1, part VI, ¶ 3), however, the referendum has already been placed on the ballot and voted upon by the electors of Cuyahoga Falls, therefore that prayer for relief is moot and no longer before the Court.[14]

II. Standard of Review.

The Court of Appeals for the Sixth Circuit has summarized the standard of review governing motions for summary judgment under Federal Rule of Civil Procedure 56 as follows:

> Summary judgment is appropriate where "there is no genuine issue of material fact ... and the moving party is entitled to judgment as a matter of law." ... [The] court must view all facts and inferences drawn

[14] Indeed, Plaintiffs never seriously advanced that prayer for relief; they did not file their preliminary injunction motion until the week after the election, November 14, 1996. (Docket # 56.)

> therefrom in the light most favorable to the non-moving party.

The moving party has the burden of conclusively showing that no genuine issue of material fact exists. Nevertheless, in the face of a summary judgment motion, the nonmoving party cannot rest on its pleadings but must come forward with some probative evidence to support its claim.

"By its very terms, this standard provides that the existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." The dispute must be genuine and the facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. If the disputed evidence "is merely colorable or is not significantly probative, summary judgment may be granted."

LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir.1993) (citations omitted). With this standard in mind, the Court will address the Defendants' present motion.

III. Res Judicata.

All Defendants argue that the Plaintiffs' instant causes of action are barred by the doctrine of res judicata. As the Magistrate Judge explained, the doctrine of res judicata or claim preclusion "refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of the determination that it should have advanced in an earlier suit." (Docket # 86, at 17 (quoting *Barnes v. McDowell,* 848 F.2d 725 (6th Cir.1988), *cert. denied,* 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 780 (1989)).) The Supreme Court in *Migra v. Warren City School District,* 465

U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), applied res judicata to a claim, such as some of those now before this Court, brought pursuant to Section 1983. After having pursued causes of action for breach of contract and wrongful interference with her employment contract in state court, the plaintiff, Ms. Migra, filed a Section 1983 action contending the violation of her fundamental rights as protected by the First Amendment. The Supreme Court had little difficulty determining that Ms. Migra's federal cause of action was precluded by her earlier suit in state court. In short, the Court held that federal courts must give full faith and credit to state court judgments including the preclusive effect of those judgments. *Id.*

Thus, in the instant case, this Court must afford the prior state court judgment the same preclusive effect that an Ohio Court would afford it. *Barnes,* 848 F.2d at 730. Ohio has adopted the modern version of the doctrine of res judicata, stating "that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Township,* 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). The *Grava* Court further explained that for two suits to be based upon the same transaction, there must be a "common nucleus of operative facts." *Id.* If the suits share a common nucleus of operative facts, then a plaintiff cannot bring the second action *"even though [he] is prepared ... (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action."* *Id.* at 383, 653 N.E.2d 226.

Applying that law to the matter now before the Court, there is evidence that both this and the Plaintiffs' original state

action derive from at least some of the same operative facts. As the Magistrate noted, fifteen paragraphs of the complaint in the instant case were taken almost verbatim from the complaint in the previous state action. Those paragraphs explain, among other things, the mission of the Plaintiff Foundation, the zoning of the property in question, and the procedure followed by the Plaintiffs and the obstacles encountered by them in their attempt to realize their goal of building the low-income housing project. (*See* Complaint pp 12, 14-20, 23-27.) Still, as Plaintiffs suggest, notable differences can be found in paragraphs 13, 24, 28, and 29. Normally, it would be for this Court to determine whether the factual differences as alleged in those paragraphs are of such disparate substance that the federal causes of action arise from a different nucleus of operative facts.

The Court finds, however, that Defendants' claim of res judicata turns instead on a distinctly different line of analysis. In *Jamestown Village Condo. Owners Association v. Market Media Research, Inc.,* 96 Ohio App.3d 678, 685, 687, 645 N.E.2d 1265 (1994), the Cuyahoga County Court of Appeals acknowledged and adopted the declaratory judgment exception to the general rule of claim preclusion. In the *Jamestown* Court's words, "a declaratory judgment [brought pursuant to O.R.C. § 2721] is not res judicata on an issue or claim not determined thereby even though it was known and existing at the time of the original action." *Id.* at 685, 645 N.E.2d 1265. *See also, Ketchel v. Bainbridge Township,* 79 Ohio App.3d 174, 177, 607 N.E.2d 22 (Geauga Cy. 1992) ("a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced") (quoting Restatement of Law 2d, Judgments Section 33 (1982)). The

rationale for this exception is grounded in the reasons for allowing actions for declaratory judgment, themselves. As explained in the Restatement (Second) of Judgments,

> Historically, an action at law generally could not be maintained unless the defendant had already violated a duty owed to the plaintiff, and the purpose of the action was to redress the wrong already committed. On the other hand, in some circumstances a suit in equity might be maintained to prevent the commission of a threatened wrong and, even though no wrong had been committed or threatened, to secure a determination--which might well be called a declaration--of the rights of the parties.... (Section 33, Comment a.)
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> When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.... A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief, if it appears that a declaration might terminate the potential controversy. (Section 33, Comment c.)

In other words, an action for declaratory judgment is intended to be a mechanism by which the parties can

potentially avoid full-fledged litigation on a number of claims, by initially focusing on a single case-dispositive issue. It would defeat this purpose if a court were to bar subsequent actions based on different legal theories due to the res judicata effect of an initial declaratory action.

Nonetheless, as the Court has noted above, in 1995 the Ohio Supreme Court adopted the "modern" view of the doctrine of res judicata. *Grava v. Parkman Township*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). One might pose the question, therefore, if an exception to the 1994 version of res judicata would survive the implementation of the modern 1995 rule. The Court holds that it does.

First of all, the Court notes that there was very little which was new in the *Grava* Court's holding.[15] Granted, before the opinion in *Grava*, Ohio's seminal case on res judicata, *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943) (syllabus ¶ 2), stated the now-outdated approach which allowed subsequent suits for different cause of actions, but that old approach has not been followed by the Ohio Supreme Court in recent years. As a matter of fact, the Ohio Supreme Court shifted back to the "modern" view at least by 1986 when it issued *Rogers v. City of Whitehall*, 25 Ohio St.3d 67, 69, 494 N.E.2d 1387 (1986) ("an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been*

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[15] Interestingly, the Supreme Court of Ohio had stated the "modern" view of the current rule as early as 1922, that is, in that year the Court acknowledged that res judicata barred the litigation of any material issue which the parties "might have litigated" in their earlier adjudication. *Schram v. City of Cincinnati*, 105 Ohio St. 324, 329, 137 N.E. 868 (1922).

litigated in a first lawsuit."). Indeed, the *Grava* opinion explains as much and cites to both the *Rogers* opinion and its opinion in *National Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178, 1180 (1990), as examples. The most reasonable explanation for the holding in its syllabus in *Grava* is that the Ohio Supreme Court realized that this modern understanding of the law had not yet been reduced to a syllabus so as to conform with that unique custom of Ohio law. A review of *Grava* and its predecessors reveals that the "modern" approach to res judicata has been taken since the mid-1980s. It follows that the declaratory judgment exception to res judicata applied by the *Jamestown* Court in 1994, was recognized and adopted within the context of the "modern rule."

Another reason for this Court to conclude that Ohio recognizes the declaratory judgment exception is that the "modern rule" which was expressly adopted by the Ohio Supreme Court in *Grava* was taken from the same Restatement upon which the *Jamestown* Court relied in finding the declaratory judgment exception to res judicata. *See Grava*, syllabus (adopting 1 Restatement of the Law 2d, Judgments (1982), Section 24-25); *Jamestown*, 96 Ohio App.3d at 685, 645 N.E.2d 1265. Furthermore, the Court notes that the Ohio Supreme Court declined to review the holding in *Jamestown* just seven months before issuing its opinion in *Grava*. While this Court does not view the denial of review as an express approval of the *Jamestown* holding, it is educational that the same court which expressly adopted the modern view of res judicata thought that an application of an exception to that doctrine was unworthy of review.

Although this Court disagrees with the Defendants' conclusions, it acknowledges Defendants' argument that there

is Ohio law which supports their view that there is no declaratory judgment exception to res judicata in Ohio. Specifically, Defendants contend that the Ohio Supreme Court decided this issue in *National Amusements v. Springdale*, 53 Ohio St.3d 60, 558 N.E.2d 1178 (1990). In that case, the Ohio Supreme Court considered an appeal from a theater owner who brought an action challenging the constitutionality of a tax on cinema admissions. Because the theater owner had brought a nearly identical cause of action five years earlier (albeit prior to a United States Supreme Court opinion which may have changed the outcome of the case), the defendant argued that the second suit was barred by res judicata.

The Ohio Supreme Court began its analysis of the case by recognizing that both causes of action requested an identical declaratory judgment and that the only difference in the second cause of action was an additional clause demanding that the city remit the taxes paid since the first law suit. *Id.* at 61 n. 1, 62, 558 N.E.2d 1178 (citing n. 1). Then the Court noted the law of res judicata as explained in *Rogers* which emphasizes that a party has a duty to bring all claims which "were *or might have been* litigated in a first lawsuit." *Id.* at 62, 558 N.E.2d 1178. Because the wording of the causes of action in both lawsuits was identical and the additional claim for relief could have been brought in the initial suit, the Court found plaintiff's claim barred by res judicata. *Id.*[16]

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[16] The Court then devoted the bulk of the opinion to the rejection of the idea that a change in the controlling Constitutional law could justify exempting a case from the effects of res judicata. *National Amusements v. Springdale*, 53 Ohio St.3d at 62-64, 558 N.E.2d 1178.

This analysis by the *National Amusements* Court does not impact this Court's consideration of the existence of a declaratory judgment exception for two complimentary reasons. First, although the initial cause of action in *National Amusements* was one for declaratory judgment, the declaratory judgment exception was not raised by the parties in the second cause of action; it was not before the Court and the Court did not consider it. Second, even if that exception had been raised, it would not have been applied by the Court in that context. The declaratory judgment exception to res judicata does not allow a plaintiff to bring successive *identical* declaratory judgment actions as the *National Amusements* plaintiff was attempting. Rather, the declaratory judgment exception is a product of the declaratory action itself, the purpose of which is to allow parties to receive a relatively expedient opinion on one issue which could control the outcome of the case. If the declaratory device functions perfectly, the parties need not reach other, potentially meritorious causes of action arising out of the same circumstances as the first. The usefulness of the declaratory judgment itself would be eliminated if we were to allow the doctrine of res judicata to bar subsequent suits brought based on *different* legal theories. However, no purpose would be served by allowing a plaintiff to bring a second suit on the *same* legal theory. It follows that in *National Amusements,* the Court was undoubtedly correct to ignore the declaratory judgment exception because the second cause of action which that Court was considering was brought on a legal theory which was identical to, rather than different from, the first suit filed by that plaintiff. *See also Shaper v. Tracy,* 76 Ohio St.3d 241, 667 N.E.2d 368 (1996) (considering suits based on identical legal issues). The *National Amusements* decision, therefore, sheds little light on the viability of the declaratory

judgment exception to the doctrine of res judicata in Ohio.

Ultimately, based on the Cuyahoga Court of Appeals decision in *Jamestown* and the Ohio Supreme Court's willingness to rely on the Restatement (Second) of Judgments, the Court concludes that Ohio does recognize the declaratory judgment exception to the rule of res judicata. In the instant case, a review of the original state court complaint, (docket # 33, ex. C), reveals that the only issue of law raised was the Defendants' ability under state law to allow a referendum on a particular *administrative* ordinance passed by the Cuyahoga Falls Council. None of the federal law causes of action now advanced in the instant suit were discussed. Therefore, as long as the initial state court action was one for declaratory judgment, it should fit within the res judicata exception.

Having thus determined that in Ohio, "a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced," *Ketchel v. Bainbridge Township,* 79 Ohio App.3d 174, 177, 607 N.E.2d 22 (Geauga Cy. 1992) (quoting Restatement of Law 2d, Judgments (1982)), and having determined that the Plaintiffs' original complaint dealt solely with a question of law not raised in the Plaintiffs' federal complaint, the Court must next determine whether Plaintiffs' original cause of action was declaratory in nature and thus within the exception to the rule of res judicata. Defendants argue that the original state complaint requested coercive relief which changed the nature of the cause of action to something other than a simple declaratory action.

Plaintiffs' original state cause of action was entitled a "Complaint for Temporary Restraining Order[,] Declaratory Judgment[, and] Injunctive Relief." (Docket # 33, ex. C.)

The Plaintiffs spelled out the facts of the case, and then requested an opinion on whether a particular vote of the Cuyahoga Falls Council could be the subject of a referendum vote of the people. (Docket # 33, ex. C, pp I-VI.) The Plaintiffs also requested the following forms of injunctive relief: (1) an order restraining the Defendants from furthering the referendum process; (2) an order barring the Defendant Board of Elections from returning the petition to the City Defendants, (3) an order barring the City Defendants from submitting same to the Board of Elections, (4) an order barring the Board of Elections from certifying and verifying the petition, (5) an order enjoining the electors from attempting to overturn the ordinance by referendum petition; and (6) the recovery of court costs, attorney fees, and "such other relief that is lawful and equitable in the circumstance." (Docket # 33, ex. C, pp III, IV.) The Plaintiffs also requested a declaration that the "Plaintiffs are able to proceed and should not be hindered in obtaining necessary building permits in an effort to promptly commence the construction of the apartment complex." (Docket # 33, ex. C, ¶ V.)

Clearly, Plaintiffs' state law complaint requested both declaratory and injunctive relief. The question thus arises whether such injunctive relief can itself be considered declaratory relief. In Ohio, a declaratory judgment action is brought pursuant to O.R.C. § 2721.02 which provides, in part, that the declaration prayed for "may be either affirmative or negative in form and effect." But this begs the question of precisely how that declaration would actually affect the parties. Fortunately, some guidance is provided by caselaw and by Ohio Revised Code Section 2721.09, which instructs that "[w]henever necessary or proper, further relief based on a declaratory judgment or decree previously granted

may be given." *See also American Life & Accident Ins. Co. of Kentucky v. Jones,* 152 Ohio St. 287, 89 N.E.2d 301 (1949) (Syllabus 3) ("Where a court has entered a declaratory judgment ... it has authority ... to grant any further necessary or proper relief.")

In *Union Oil Company of Cal. v. City of Worthington,* 62 Ohio St.2d 263, 405 N.E.2d 277 (1980), the Ohio Supreme Court explored the breadth of the relief available to a land owner who had brought a successful declaratory judgment action to strike down an unconstitutional zoning law. The defendant City in that case acknowledged that the reviewing court had the ability to declare the zoning laws unconstitutional but argued that it could then "go no further," but must leave the property "unzoned" until the city adopted new zoning legislation. *Id.* at 265, 405 N.E.2d 277. The *Union Oil* Court rejected this narrow restriction of the court's powers as "impractical and inequitable." *Id.* (quoting with approval *Ed Zaagman, Inc. v. City of Kentwood,* 406 Mich. 137, 277 N.W.2d 475 (1979)). Nonetheless, the Court recognized the danger of allowing a court to rezone the property from one classification to another without evidence of the reasonableness of the new zoning category. *Id.* at 266, 405 N.E.2d 277. Therefore, the Court set out a procedure for Ohio courts to follow in such a circumstance:

> [I]n a declaratory judgment action, upon finding existing zoning unconstitutional as applied to specific real property, the trial court should give notice to the zoning authority that, within a reasonable time certain, it may, at its option, rezone the property. Further notice should be given that, if the property is not rezoned within such period of time, the court will authorize the property owner to proceed with the

> proposed use if, on the basis of the evidence before it, the court determines the proposed use to be reasonable. The court may enjoin the property owner from seeking a building permit, establishing a nonconforming use or otherwise changing the status quo during the interim. If necessary, the court may conduct further proceedings, including the hearing of additional evidence, to determine whether the new zoning restrictions may constitutionally proscribe the owner's proposed use.

Union Oil, 62 Ohio St.2d at 267, 405 N.E.2d 277.

This Court explains the holding in *Union Oil* not because this Court intends to apply those guidelines to the facts of this case, but rather to show that Ohio law presumes that some sort of injunctive relief may be required in order to give meaning to a declaratory judgment. In *Union Oil* that relief necessarily included enjoining enforcement of the unconstitutional zoning policy. That Court also opined that appropriate relief might include authorizing a landowner to use property in a manner deemed reasonable by the court, or enjoining the landowner himself from changing the status quo before the city has had a chance to adopt new zoning requirements. *Id.*

Based on its reading of *Union Oil,* the Geauga County Court of Appeals reached a conclusion which this Court shares: in Ohio, a court which enters a declaratory judgment may grant whatever relief is necessary or proper to give effect to that declaratory judgment. *Ketchel v. Bainbridge Twp.*, 79 Ohio App.3d at 178, 607 N.E.2d 22.[17] The *Ketchel* Court

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[17] Other Ohio cases reinforce the conclusion that necessary or proper, or in other words, *appropriate* relief is typically granted upon the issuance of a declaratory judgment in Ohio. *See W.O. Brisben Co. v. City of Montgomery,* 92 Ohio App.3d 812, 822, 637 N.E.2d 347, 354 (Hamilton Cy. 1994) (applying *Union Oil* guidelines); *Chace v. Dorcy Int'l. Inc.*, 68 Ohio App.3d 99, 587 N.E.2d 442 (Cuyahoga Cy.1991) (Krupansky, C.J.) (finding money damages can be appropriate in a declaratory judgment action for indemnification); *Gannon v. Perk,* 47 Ohio App.2d 125, 352 N.E.2d 606 (Cuyahoga Cy.1975) (Syllabus 1) (Krenzler, C.J.) (holding that when declaratory judgment action also seeks ancillary injunctive relief the nature of the action has not been changed from one at law to one at equity), *aff'd in part, rev'd in part on other grounds,* 46 Ohio St.2d 301, 348 N.E.2d 342 (1976).

then reasoned that because the request for necessary injunctive relief in that plaintiff's complaint would not change the nature of the declaratory action, the declaratory cause of action would fit cleanly into the declaratory judgment exception to the doctrine of res judicata. *Id.*[18] It is now for this Court to determine whether the relief these Plaintiffs requested in their state claim was necessary and proper, that is, whether it was relief appropriate to a claim for declaratory

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[18] Defendants urge the Court to view *Ketchel* and consequently *Union Oil* narrowly so as to limit the availability of "necessary and proper" relief only to declaratory actions which question the constitutionality of an ordinance. While those cases did indeed consider constitutional issues, the same conclusions can be drawn from the broader language in other authority which this Court must consider, including *American Life & Accident Ins. Co. v. Jones,* 152 Ohio St. 287, 89 N.E.2d 301 (1949) (Syllabus 3), and Ohio Revised Code Section 2721.09. Both sources allow "necessary or proper relief" in support of a declaratory judgment and neither base this relief on whether there is a constitutional basis for the declaration.

judgment. If so, then the state claim was clearly a declaratory judgment action.

Of the requests for relief stated by Plaintiffs and summarized by the Court *supra,* the first six request injunctive relief of the type necessary to give meaning to the Plaintiff's preferred court declaration: that the ordinance in question could not be the subject of a referendum of the people. Under Ohio law, the relief sought was typical of a declaratory judgment action and therefore, the nature of the declaratory action was not changed. This aspect of the initial state complaint supports the application of the declaratory judgment exception to the rule of res judicata.

The sixth form of relief also includes a request for attorney fees and costs. Such costs are expressly allowed by Ohio Revised Code Section 2721.11 which states, "In any proceeding under sections 2721.01 to 2721.15, inclusive, of the Revised Code, the court may make such award of costs as is equitable and just." It is thus clear that the request for fees and costs made by Plaintiffs in the initial action does not change the nature of that cause of action and does not affect the applicability of the declaratory judgment exception to the doctrine of res judicata.

Finally, the Court considers Plaintiffs' other request for a declaration that the "Plaintiffs are able to proceed and should not be hindered in obtaining necessary building permits in an effort to promptly commence the construction of [the apartment complex]." (Docket # 33, ex. C, ¶ V.) One might argue that this particular demand for relief involves something that is beyond the scope of the rest of the complaint, namely, a declaration that Plaintiffs should not be hindered in their attempts to obtain their building permits. The Court does not,

however, view this request as a fatal flaw. First of all, on its face, this demand for relief involves only a request for a declaration and not a request for injunctive relief. Second, even if the demand was read as one for injunctive relief, that injunctive relief would be appropriate under the circumstances. That is, if Plaintiffs had been successful in obtaining a declaratory judgment that the referendum was illegal, the state court would have been well within its authority to preclude the defendants from interfering with the rights held by Plaintiffs in the absence of that referendum. One of those rights would be the right of the landowner to apply for and (presuming the landowner met all other prerequisites) receive building permits. Hence, the relief sought by Plaintiffs in the initial state declaratory action was appropriate to such a cause of action and did not change the nature of that action.

By way of summary, this Court finds that the cause of action first brought in state court by these Plaintiffs was one for declaratory judgment on an issue of state law which is not a basis for their current claims before this Court. While the Ohio law of res judicata would prevent the Plaintiffs from re-litigating that state law question, an exception to that rule allows these Plaintiffs to bring this subsequent lawsuit because it relies upon different, federal legal theories. Therefore, the instant cause of action is not barred by res judicata.

IV. Standing of the Fair Housing Service.

Although not challenged by Defendants, the Magistrate Judge below appropriately considered the jurisdictional requirement of standing. This Court agrees with the Magistrate Judge that "federal courts are under an independent obligation to examine their own jurisdiction, and

standing 'is perhaps the most important of [the jurisdictional] doctrines.' " (Magistrate's Report, docket # 86, at 45 (citation omitted).) Standing is a rule of practice designed to enforce the constitutional rule that United States Courts only have jurisdiction over "cases" or "controversies." *Akron Bd. of Educ. v. State Bd. of Educ. of Ohio,* 490 F.2d 1285, 1289 (6th Cir.), *cert. denied,* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236 (1974) (quoting *Barrows v. Jackson,* 346 U.S. 249, 257, 73 S.Ct. 1031, 1035-36, 97 L.Ed. 1586 (1953); U.S. Const. art. III, § 2 cl. 1); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). "In order to establish standing sufficient to satisfy the 'case or controversy' requirement of Article III, a plaintiff in federal court must allege 'such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on its behalf.' " *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati,* 56 F.3d 710, 715 (6th Cir.1995) (quoting *Warth v. Seldin,* 422 U.S. at 498-99, 95 S.Ct. at 2205 (quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962))).

The Supreme Court's most recent pronouncement on standing explained that in order to establish standing under the Constitution, a plaintiff must show three things; as an "irreducible minimum" there must be:

(1) an injury in fact,

(2) a causal relationship between the injury and the

challenged conduct, and

(3) a likelihood that the injury will be redressed by a favorable decision.

United Food and Commercial Workers v. Brown Group, Inc., --- U.S. ----, ----, 116 S.Ct. 1529, 1533, 134 L.Ed.2d 758 (1996) (citing *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663, 113 S.Ct. 2297, 2301-02, 124 L.Ed.2d 586 (1993); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758-59, 70 L.Ed.2d 700 (1982)). In addition to the requirements imposed by the Constitution, the courts have developed certain nonconstitutional prudential considerations which further guide a court's determination regarding a party's standing.

"[T]he plaintiff generally must assert his own legal rights, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. at 499 [95 S.Ct. at 2205]. In addition, even when the plaintiff has alleged redressible injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Id.* at 499-500 [95 S.Ct. at 2205-206]. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data*

Processing Service Orgs. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75, 102 S.Ct. 752, 759-60, 70 L.Ed.2d 700 (1982).

In his report and recommendation, the Magistrate Judge found that the Fair Housing Contact Service lacks standing as an association to bring the instant claims. As the Magistrate explained, an organization may have standing to sue in a representative capacity only when it can show that, "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested requires participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *see also International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock,* 477 U.S. 274, 282, 106 S.Ct. 2523, 2528-29, 91 L.Ed.2d 228 (1986); *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati,* 56 F.3d 710, 717 (6th Cir.1995) (quoting *Hunt*). The Magistrate believes that the Fair Housing Contact Service has not satisfied these requirements.

In reaching this conclusion the Magistrate considered all of the relevant evidence in the record. First, he noted that the only direct reference to the Plaintiff Service in the complaint was in paragraph eight which alleges:

> Plaintiff Fair Housing Contact Service is a not-for-profit, fair housing organization located in Akron, Ohio. Fair Housing Contact Service has had a

> contract with Summit County since 1974 to provide fair housing services, landlord-tenant counseling, housing research, and technical assistance. Fair Housing Contact Service is required to provide for fair housing activities throughout the county. Part of this agreement states that as a recipient of funding, Fair Housing Contact Service will "administer all programs and activities relating to housing and community development in a manner to affirmatively further fair housing within Constitutional limitations throughout the United States." Some of its employees and members are potential tenants for the apartment complex to be built by the Developers at the Pleasant Meadow Blvd[.] property. The actions and conduct of the defendants are frustrating the fair housing purpo[ ]se of the organization, its employees and members.

(Docket # 1 at ¶ 8.) Nowhere else in the complaint is the Fair Housing Contact Service specifically mentioned.

Other references to the Plaintiff Service also found includes an October 29, 1996 affidavit of Lynn M. Clark, Executive Director Fair Housing Contact Service. (Docket # 50, Exhibit L.) In pertinent part, the affidavit states:

> FHCS has been damaged by the Defendants in case No. 5:96CV1458 because its mission has been thwarted and its resources expended to combat the discrimination in housing that FHCS believes occurred as described in the pleadings in that matter.
>
> FHCS employees and individual members who subscribe to our services will be harmed by the Defendants in case No. 5:96CV1458 because they are perspective [sic] eligible residents for this housing

> which would enable them to save monies and not be forced to expend excess funds on obtaining safe and decent housing. Preventing the development of this housing will cause FHCS employees and members permanent and irreversible harm by denying them an [sic] choice of affordable, safe and decent housing located in the neighborhood of their preference.
>
> (Docket # 50, Exhibit L.)

Further evidence was obtained on Tuesday, November 19, 1996, at the injunction hearing before this Court. Plaintiffs presented the testimony of two persons who identified themselves as members of Fair Housing Contact Service, Sandra Montgomery and Crystal M. Williams. (Tr. at pp. 158-69.) Ms. Montgomery testified that she had been a member of Fair Housing Contact Service for about four years. (Tr. at p. 159.) In response to the question, "[i]f you could rent a two or three bedroom apartment in Cuyahoga Falls on Pleasant Meadow Boulevard and your child could attend the Woodridge schools at a below market rent, below fair market rent value, would you apply to rent at that apartment building?", Ms. Montgomery testified, "Yes, I would." (Tr. at p. 159.) On cross-examination, Ms. Montgomery testified that she became a member of Fair Housing Contact Service by calling its office, that she did not have to pay any dues, and that she does not receive any newsletters. (Tr. at pp. 159-60.) She described her contact with Fair Housing Contact Service since becoming a member as "not a lot." (Tr. at p. 160.) Ms. Montgomery further testified that her first contact with anyone regarding the case was the previous Saturday, when she spoke with Lynn Clark and volunteered to testify. (Tr. at pp. 162-63.)

Crystal Williams also testified that she would apply to rent a two or three bedroom apartment, at below market rent, on Pleasant Meadow Boulevard in Cuyahoga Falls. (Tr. at p. 166.) Ms. Williams, a student at the University of Akron, testified that if she had a subsidized apartment, she would probably attend graduate school. (Tr. at 166-67.)

Although the Fair Housing Contact Service appears to be a rather uncomplicated organization to join and maintain membership in, this Court knows of no stringent federal requirements that members of an organization must satisfy in order to be considered an organizational member. Nevertheless, the evidence does tend to show that the members are interested in equal access to subsidized housing--a topic central to the stated purpose of the Contact Service--thus it would appear that if there were some formalistic requirement for membership, both Ms. Montgomery and Ms. Williams would qualify. The Court views these women as proper "members" for purposes of determining the Fair Housing Contact Service's standing.

As this Court explained above, there are many important requirements for standing; while most of these do not require exhaustive discussion by this Court sua sponte, the Court does feel obliged to address those requirements discussed by the Magistrate in his report and recommendation. Specifically, the Magistrate Judge questions whether the Fair Housing Contact Service or its members have been injured by the Defendants' actions. (Docket # 86, at 50.) Without an injury in fact to itself or its members, the Contact Service does not have standing.

The Magistrate Judge correctly notes that the Contact Service itself has only alleged two specific harms: a

thwarting of the Contact Service's mission to provide fair housing access, and the expenditure of significant time and resources to combat what it perceives to be discriminatory housing actions in this case. While the Court has serious questions regarding whether these injuries are sufficiently concrete and particularized to convey standing on the organization itself, the Court need not address those questions as it finds that the Contact Service has presented facts sufficient to allow a finding of standing in its representative capacity.

First, no one has contested, and this Court sees no reason to conclude that either the claim asserted or the relief requested requires participation of the Contact Service's individual members in the lawsuit. *See Neighborhood Action Coalition v. City of Canton,* 882 F.2d 1012, 1017 (6th Cir.1989) (allowing association to pursue injunctive relief). Second, there can be little doubt that the interests that the Contact Service seeks to protect are germane to its purpose. Finally, there is substantial evidence that the Contact Service's members would have standing to sue in their own right. *See Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. at 343, 97 S.Ct. at 2441 (establishing associational standing).

It is fitting, of course, for this Court to hold Plaintiffs to a burden of proof appropriate to this particular stage of litigation. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992). Currently, the Court is considering a case that is at the summary judgment stage, and thus the Plaintiff Contact Service need only " 'set forth' by affidavit or other evidence 'specific facts' [which] will be taken as true." *Id.* Granted, this can be a substantial burden because the injuries of the

Plaintiff Contact Service's members arise from the government's allegedly unlawful treatment of someone else. *See id.* at 562, 112 S.Ct. at 2137. But the Plaintiff Contact Service is not precluded from establishing that the government defendant's actions cause redressible injury to befall the members of the Contact Service in addition to the sponsors of the project itself. *Id.*

In the instant case, the testimony of Ms. Montgomery and Ms. Williams, which this Court must accept as true, indicates that they are African-American mothers of young children whose income makes them eligible for subsidized housing. Both women testified that they would like to be residents in the apartment complex which the Defendants are alleged to have illegally prevented from being built. At this stage of the proceedings, the testimony of Ms. Montgomery and Ms. Williams is sufficient to establish that the Defendants' denial of the site plan and subsequent denial of building permits caused them a concrete and particularized injury. Furthermore, it cannot be questioned that should the Plaintiffs in the instant cause of action be successful, the members of the Contact Service will have their injuries redressed by the actual building of the apartment complex in which they wish to live. Fair Housing Contact Service members Montgomery and Williams could file suit in their own right if they so choose.

Because the members of the Plaintiff Fair Housing Contact Service could bring this action in their own right, and because the Plaintiff's ability to satisfy the other associational standing requirements is not in doubt, this Court concludes that the Plaintiff Fair Housing Contact Service has presented sufficient evidence at this stage to satisfy the Court's inquiry into its standing to bring the instant cause of action. Insofar

as the Magistrate Judge's recommendation is contrary to this holding, it is not adopted.

V. Judicial Immunity.

Next, the Defendants make the creative argument that they are entitled to judicial immunity for all of their actions occurring after Judge Murphy issued his opinion in the state court case. The argument is presented as follows: "An administrative officer who is carrying out a court order is cloaked with judicial immunity for claims of civil rights actions." (Docket # 32, at 13 (citing *Foster v. Walsh,* 864 F.2d 416 (6th Cir.1988)).) "[Judge Murphy] issued an order upholding the referendum provision of the City charter and denying the plaintiffs' request for injunctive relief." (*Id.*) Hence, "the City's actions have been taken in obedience to a court order, [and] the City and its officials are judicially immune from the allegations of the instant lawsuit." (*Id.*) Defendants oversimplify and misapply the doctrine of judicial immunity.

Although, generally speaking, a person may enjoy judicial immunity while carrying out a court order, the Defendants in the instant case were not carrying out such an order. Judge Murphy's decision in the original state cause of action specifically denied the Plaintiffs' request for a preliminary or permanent injunction. (Docket # 33, ex. B.) Judge Murphy did not affirmatively order the Defendants to do anything. It follows that the Defendants were not carrying out a court order when they transmitted the referendum to the Board of Elections for inclusion on the next ballot, when they refused to give effect to the site plan ordinance, or when they denied Plaintiffs their requested building permits. The only thing that can be said about the Defendants' conduct is that it did

not violate the court order. Their motion for summary judgment on this ground is frivolous. The motion is denied.

VI. Plaintiffs' Constitutional and FHA Claims.

A. Effectiveness of the Ordinance and Effect of the Petition.

In order to understand the Plaintiffs' federal claims and the Defendants' motions opposing them, it is first important to understand the procedural context in which they arose. A summary of the legislative process followed in this case is thus provided. The Cuyahoga Falls City Council approved the ordinance which embodied Plaintiffs' site plan on April 1, 1996. The Mayor did not sign the ordinance, but according to the City Charter Article 2, Section 5, if the mayor does not act upon the ordinance within ten days then the ordinance "shall take effect in the same manner as if he had signed it," what this Court will refer to as a "pocket approval." So ten days after its passage by Council, the ordinance was pocket approved by the Mayor. As of this stage there was no evidence that the City Defendants did anything to give effect to the citizen's petition. But the Court will inquire further to determine if the City Defendants' subsequent actions implicated the Plaintiffs' federal rights.

Section 4 of the ordinance in question denotes that it would go into effect immediately only if it was approved by "two thirds of the members elected or appointed to Council," (Plaintiffs' exhibit 8), however, the ordinance received only 6/11 of the vote. It was not an emergency measure and did not take effect immediately. Instead, the ordinance was to take effect "as provided by law," a phrase not explained in the Cuyahoga Falls Charter, nor in the Rules and Regulations, Ordinance Number 77-1991. So, pursuant to that ordinance,

we look to the Ohio Revised Code for guidance. (*See* Ord. Nos. 77-1991, §§ 8.2, 10.4.) Ohio Revised Code Section 705.16 provides: "All ordinances or resolutions shall be in effect after thirty days from the date of their passage...." Section 1.14 of the Ohio Revised Code tells us that when counting thirty days, the first day is excluded and the last day included. May 1, 1996, is thirty days from April 1, 1996; May 2, 1996, is the first day *after* thirty days from the date of passage. Therefore, the ordinance was to take effect the moment after 12:00 midnight on May 2, 1996. *See Frontier-Embers Supper Club, Inc. v. Board of Liquor Control,* 112 Ohio App. 325, 172 N.E.2d 717 (1960). The question remains whether these City Defendants did anything to prevent the Plaintiffs' site approval ordinance from taking effect.

The City Charter states that within 30 days after the Council passes an ordinance, citizens of the city may file a petition signed by at least ten percent of the electors requesting that such ordinance be repealed or submitted to the voters as a referendum. (Charter Art. IX, § 2.) Such a petition was filed in this case on or about April 29, 1996. If the ordinance so challenged is not repealed by the Council within thirty days, the ordinance is to be submitted to a vote of the people. The ordinance itself cannot "go into effect until approved by a majority" of the electorate. (Charter Art. IX, § 2.) An ordinary reading of this Charter provision could lead one to conclude that the effectiveness of the Ordinance is stayed when the Council recognizes the filing of a valid petition.[19] However, Plaintiffs argue that the Charter language only stays the effectiveness of ordinances which

[19] This is a common procedural construct in Ohio. *See* O.R.C. § 731.29; Ohio Constitution Art. II, § 1C, Art. XVIII, § 5.

have already been reconsidered by the Council and not repealed, and which have consequently been prepared for submittal to a referendum of the people. In other words, Plaintiffs believe that the effectiveness of the law is not stayed until the ordinance has been referred to the Board of Elections, which in this case occurred on May 30, 1996.

While the Court agrees that Article IX, § 2 is not artfully drafted, the Court must also agree with Defendants that its meaning is clear enough. In a vacuum, the words "no such ordinance" have little meaning, or rather, they have so many potential meanings that they are quite unhelpful. But here, the words "no such ordinance" are followed by the words "shall *go into effect* until approved by a majority of those voting thereon...."[20] It is axiomatic that in order for an ordinance to "go into effect" it cannot already be in effect. Thus in order to give meaning to these words in Article IX, Section two of the Cuyahoga Falls Charter, the Court must conclude that the ordinance has never gone into effect. At some moment in time after the filing of the petition and before the ordinance was to take effect on May 2, the effectiveness of the ordinance was stayed.

Indeed, upon the filing of the petition, the City Engineer Gerald Dzurilla sought advice from the City Law Director concerning the effect of the petition on his authority to issue building permits for the property identified in the ordinance. (Dzurilla aff. ¶ 4.) On April 30, 1996, Engineer Dzurilla received a response indicating that building permits for the construction of the apartment complex could not be issued

[20] The provision also explains that the law will not take effect until five days after certification of that approval by the Board of Elections.

because the site plan ordinance "does not take effect" due to the petitions. (Dzurilla aff. ¶ 5, ex. A.) Thus, practically as well as theoretically speaking, the Plaintiffs were unable to secure the benefit of their otherwise lawfully approved site plan on the date that the site plan was to take effect, May 2, 1996.

Defendants now move for judgment on the substance of the Plaintiffs' claims arising from this chain of events. Although there are several bases for Plaintiffs' instant claims, the gist of all of those claims is that Plaintiffs have been unlawfully denied their site plan and all of its consequent benefits, including a building permit for their low-income housing project. Because the Plaintiffs believe that the City's action was arbitrary and capricious when it withheld the site and building permits, Plaintiffs allege a claim based in substantive due process as protected by the Fourteenth Amendment and Section 1983. The Plaintiffs also believe that the city refused to give effect to the site plan ordinance and thus gave effect to intentional racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Sections 1981, 1982, and 1983. Putting aside for the moment the racial motivations, Plaintiffs further argue that the city gave effect to a referendum which had no rational relationship to the granting of a site plan. Finally, the Plaintiffs allege that by staying the effectiveness of the site plan, the Defendants furthered anti-family bias in violation of the Fair Housing Act.

B. Ripeness.

The question of ripeness has not, of course, been raised by the parties as a question unto itself but rather it has arisen as an element of this Court's previous discussions of the doctrine of res judicata. (*See* docket # 94, at 11.) Because the issue has been so thoroughly briefed and because a discussion of ripeness is so instructional on the merits of Plaintiffs' federal claims, the Court will address it first.

It has been said that the ripeness doctrine "dictates that courts should decide only existing, substantial controversies, not hypothetical questions or possibilities.... Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *City Communications, Inc. v. City of Detroit,* 888 F.2d 1081, 1089 (6th Cir.1989). The determination of whether a claim is ripe rests both on Article III of the Constitution and on a court's discretionary powers. *See e.g., Buckley v. Valeo,* 424 U.S. 1, 114, 96 S.Ct. 612, 680, 46 L.Ed.2d 659 (1976) (per curiam); *Socialist Labor Party v. Gilligan,* 406 U.S. 583, 588, 92 S.Ct. 1716, 1719, 32 L.Ed.2d 317 (1972); *see also* 13A Wright, Miller, & Cooper, *Federal Practice and Procedure,* § 3532 (1984). At a minimum, ripeness requires that the effects of the administrative action challenged have been "felt in a concrete way by the challenging parties." *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 57, 113 S.Ct. 2485, 2495, 125 L.Ed.2d 38 (1993) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967)); *see also Lujan v. National Wildlife Federation,* 497 U.S. 871, 891, 110 S.Ct. 3177, 3190, 111 L.Ed.2d 695 (1990) (a controversy concerning a regulation is not ordinarily ripe for review until the regulation has been applied to the claimant's situation by some concrete

action).

Previously, this Court considered Plaintiffs' contention that their claim was not ripe until the election on November 6, 1996, when the voters of Cuyahoga Falls voted down the ordinance in question. The Plaintiffs believed that this Court's analysis was controlled by the Supreme Court's opinion in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). *See also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). In *Williamson,* the Supreme Court considered a takings claim brought pursuant to 42 U.S.C. Section 1983, and held that the claim was not yet ripe because the initial decisionmaker in that case had not yet arrived at a definitive position on the plaintiff's zoning request and thus the plaintiff had not suffered an actual, concrete injury. *Id.* The Plaintiffs in this case argued that they were unable to bring their federal causes of action until the *voters* of Cuyahoga Falls denied them of the rights they now seek to enforce. According to Plaintiffs, only after the election on November 6, 1996, was there a definitive position taken and they suffered an actual, concrete injury. The Court, however, did not accept this interpretation. (*See* docket # 94, at 15-16.)

After careful consideration, the Court is not convinced that the ripeness analysis heretofore applied by the parties and referred to by this Court is altogether applicable. That is, the Court believes that the application of the strict ripeness analysis explained in *Williamson* should be reserved to cases challenging the application of zoning laws. While the instant case does involve the regulation of real property by the local municipality, it does not involve a challenge to zoning laws

which unarguably would accommodate the Plaintiffs' proposed housing complex. Rather, the instant case involves a challenge to the City's refusal to grant the Plaintiffs the benefit of a site plan ordinance due to the filing of a petition. Such a challenge is properly addressed by an ordinary ripeness inquiry into whether the staying of the effectiveness of the site plan ordinance was felt in a concrete way by the Plaintiffs. All evidence in the record indicates that these Plaintiffs were prepared to build the controversial housing project upon receipt of the necessary permits, and that they were denied their ability to proceed under the site plan on May 2, 1996. Based on these facts, the Court cannot help but conclude that all of the Plaintiffs' claims were ripe on May 2, 1996.[21]

In any case, even if the Court were to apply the more formalistic analysis found in *Williamson* and its progeny, the Court would conclude that Plaintiffs' claims are ripe. Specifically, the Sixth Circuit has acknowledged in post-*Williamson* zoning challenges that claims based on the Due Process and Equal Protection Clauses rather than the takings provision, are subject to a less rigorous ripeness test. *See*

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[21] If this dispute centered only on the consequent denial of building permits to Plaintiffs, the conclusion would be the same. While Defendants argue that the building permits were properly denied because the Plaintiffs had failed to erect a costly fence on one end of the property, the facts make it clear that the building of the fence by Plaintiffs would have been a futile act--what the Sixth Circuit has referred to as "a waste of time and money." *Bannum, Inc. v. City of Louisville, Ky.,* 958 F.2d 1354, 1362 (6th Cir.1992). The Defendants had already concluded that the building permits could not issue due to the ineffective site plan ordinance. (*See* Dzurilla aff. ¶ 5, ex. A.)

Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 895 (6th Cir.1991); *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1362-63 (6th Cir.1992); *see also Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 46 (6th Cir.1992) (implying same ripeness inquiry applicable to Fair Housing Claims). In *Nasierowski*, the Sixth Circuit considered a due process claim challenging the process by which an amendment was made to a zoning statute. The Circuit held that because the City Council in that case had voted to pass a new zoning ordinance which, *in and of itself* inflicted immediate injury on the plaintiff, his procedural due process claims was ripe without requiring him to first seek relief from the city's board of zoning appeals. *Nasierowski*, 949 F.2d at 893-95. There was, therefore, no need to engage in the sort of strict ripeness analysis which the Supreme Court had considered in *Williamson*. Later, in *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214-15 (6th Cir.1992), the Sixth Circuit extended this understanding of the law to cases involving plaintiffs' demands for substantive due process. *See also Millington Homes Investors, Ltd. v. City of Millington, Tenn.*, 60 F.3d 828 (Table), 1995 WL 394143, at *8 (6th Cir.1995) (holding no ripeness requirements for substantive due process claims in zoning cases). Applying the *Pearson* holding to the instant matter, the Court must find that the Plaintiffs' due process claim satisfies any ripeness requirements.

In two cases involving equal protection challenges to the application of local zoning laws, *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1362-63 (6th Cir.1992), and *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587-88 (6th Cir.1992), the Sixth Circuit acknowledged the doctrine of futility as a method for attaining ripeness despite a plaintiff's

failure to fulfill the *Williamson* final decision requirement. The *Bannum* Court first articulated the *Williamson* concern that finality is required before a plaintiff may bring a constitutional challenge. But the *Bannum* Court explained the reasoning behind the requirement as follows: "We do not want to encourage litigation that is likely to be solved by further administrative action and we do not want to put barriers to litigation in front of litigants when it is obvious that the process down the administrative road would be a waste of time and money." *Bannum*, 958 F.2d at 1362. Then, focusing on the latter half of this explanation, the *Bannum* Court acknowledged that the *Williamson* finality requirement could be satisfied if further administrative action by the Plaintiff would be futile. *Bannum*, 958 F.2d at 1362-63. In order to successfully argue for the application of the futility exception, a plaintiff must have made at least one unsuccessful "meaningful application" for a zoning variance. *Id.* at 1363; *Seguin*, 968 F.2d at 589.

The claim brought by the Plaintiffs in the instant case is factually distinct from the context in *Bannum* and *Seguin*, but their reasoning is nonetheless helpful. Here, the Plaintiffs do not complain of an unfair zoning requirement and the failure of the city to grant a variance to that requirement as did the plaintiffs in *Bannum* and *Seguin*. The land bought by these Plaintiffs was already properly zoned for the type of multi-family apartment complex which the Plaintiffs propose. The Plaintiffs bought properly zoned property, met the conditions required by the City for a site plan, had that site plan approved by committee, by the Council as a whole, and by the Mayor, and only then were they denied the benefit of that site plan ordinance when the City, pursuant to its Municipal Charter, gave effect to a petition bearing the signatures of ten

percent of the citizenry. Thus, the Court finds it appropriate to restate its conclusion that this is not the typical *Seguin* or *Williamson*-styled *zoning* case, rather this case involves the constitutionality of giving effect to the citizens' petition by withholding the effectiveness of the Plaintiffs' site plan ordinance. It follows that *Williamson*'s strict ripeness requirements should not apply at all, but in any case, it is clear that these Plaintiffs need not have applied for a zoning variance in order to bring a ripe equal protection claim.

One could argue, however, that the requirement of a meaningful application for a zoning variance is analogous in this case to a requirement that the Plaintiffs must attain finality through the vote of the electorate at the referendum. Applying the futility analysis of the Circuit's equal protection zoning cases, the Court finds that the Plaintiffs' equal protection claims are ripe because any further "process down the administrative road" would have been "a waste of time and money." *Bannum,* 958 F.2d at 1362. Granted, as of May 2, 1996, the citizens of Cuyahoga Falls had not yet overwhelmingly defeated the Plaintiffs' site plan ordinance as they did in November of that year, but the proof of time supports what was then an inevitable conclusion: The Plaintiffs' site plan ordinance would never gain the support of the citizenry. Insofar as the Plaintiffs can be seen to have failed to complete their administrative process, the undisputed evidence supports the conclusion that pursuit of that administrative process through the polls would have been futile.

Finally, the Defendants have argued that the Plaintiffs' claims were not ripe because they failed to build a fence as they were required to do by the terms of the site plan. This argument fails at this stage of the proceedings for at least two

reasons. First, the Plaintiffs here challenge the denial of the site plan itself as well as the building permit which had the fence as a prerequisite. The Defendants' "fence" argument does not explain the denial of the site plan itself.[22] Second, there is ample evidence in the record which would indicate that building the fence would have been "a waste of time and money." *Bannum,* 958 F.2d at 1362. *See* testimony of Boone at Tr. 48, 92. Plaintiffs have presented evidence that it would have been futile to build the required fence.

In sum, no matter which approach to the doctrine of ripeness one takes, the result is the same, the Plaintiffs' claims were ripe by May 2, 1996.[23]

C. Failure to State a Claim/Municipal Liability.

Defendants have raised a number of other defenses to Plaintiffs' claims, including the assertion that the Plaintiffs' constitutional claims fail to state a claim against the City of Cuyahoga Falls upon which relief can be granted. (Docket # 32, at 13-14.) Because Plaintiffs have brought suit against most of the Defendants in solely their official capacity, the City is a true Defendant in this matter, and the Defendants' argument is logically raised. Indeed, it is well-established law that a municipal corporation is not liable for every civil rights violation committed by one of its employees. *Monell v. Dep't of Social Services of City of New York,* 436 U.S. 658, 98

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[22] The Defendants had already concluded that the building permits could not issue due to the ineffective site plan ordinance. (*See* Dzurilla aff. ¶ 5, ex. A.)

[23] Even if *Pearson* had not presented this Court with direct precedent for finding Plaintiffs' substantive due process claim to be ripe, the Court would find it ripe under this futility analysis as well.

S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Frost v. Hawkins County Bd. of Educ.*, 851 F.2d 822, 828 (6th Cir.1988). Rather, in order for the Municipality to be held liable, the Plaintiffs must demonstrate that the unconstitutional act complained of was committed by one of Defendant's employees *pursuant to an established policy or custom of that government defendant*. *Id.* Under appropriate circumstances, a specific occurrence of the deprivation of a constitutional right by the City could establish such an illegal policy or custom if the deprivation was due to the decision of a municipal policymaker. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480, 106 S.Ct. 1292, 1298-99, 89 L.Ed.2d 452 (1986) (plurality).[24] Furthermore, a plaintiff must demonstrate that through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. *Board of County Comm'rs of Bryan County, Okla. v. Brown,* --- U.S. ----, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (considering § 1983 excessive force claim).

In this case there can be no doubt that the policymakers of

[24] The identification of policymakers is a function of state law. *St. Louis v. Praprotnik,* 485 U.S. 112, 124, 108 S.Ct. 915, 924-25, 99 L.Ed.2d 107 (1988)(plurality); *Johnson v. Hardin County, Ky.*, 908 F.2d 1280, 1286-87 (6th Cir.1990) (harmonizing the *Praprotnik* opinions of Justices O'Connor and Brennan finding that a policymaker is he who, under state law, has decisionmaking authority unconstrained by the policy of a superior or of the city); *Adkins v. Board of Educ. of Magoffin County, Ky.*, 982 F.2d 952, 957-58 (6th Cir.1993). "A federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik,* 485 U.S. at 126, 108 S.Ct. at 925.

Cuyahoga Falls declared the site plan ordinance to be ineffective and refused to issue building permits for that reason. Moreover, it is clear that the policymakers of Cuyahoga Falls did so pursuant to provisions of their City Charter and that this city policy was the moving force which gave a staying effect to the citizens' petition and referendum. The question for the Court is thus, not whether the actions of the government actors were done pursuant to a city policy, they assuredly were, but rather the question is whether that policy has been applied so as to authorize the deprivation of federal rights.

D. Constitutionality of Federal Statutes and Viability of Plaintiffs' Claims.

Having now dealt with an abundance of jurisdictional and other preliminary matters, the Court finds that it can finally reach Defendants' arguments which, in turn, reach the substance of Plaintiffs' claims. As stated previously, Plaintiffs claim that they suffered harm to rights protected by the Fair Housing Act, 42 U.S.C. §§ 3601, 3604, and 3617, and provisions of the Civil Rights Act, including 42 U.S.C. §§ 1981, 1982, (Complaint ¶ 37), as well as the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 (pp 39, 44); and the Equal Protection Clause of Fourteenth Amendment and 42 U.S.C. § 1983 (¶ 41). The Court will first address the Defendants' conceptually curious argument that the provisions of statutory law upon which Plaintiffs rely are unconstitutional as Plaintiffs seek to apply them. (Docket # 32, at 16.)

Defendants' first argument under this heading appears to challenge the Plaintiffs' Constitution-based claims which allege that Defendants violated the Plaintiffs' right to due

process and equal protection by giving effect to the citizens petition in refusing to grant site and building permits to the Plaintiff Developer. Defendants first argue that Plaintiffs' real dispute is with the citizens who brought the referendum to whom the Council deferred as required by the city charter. While Plaintiffs may indeed have a disagreement with the supporters of the referendum, Defendants' argument misses the point. The citizen's opposition would mean nothing if the City did not give it effect by denying permits to the Plaintiff Developer. It is that *City* action which the Plaintiffs challenge here. In truth, Defendants' argument is nothing more than a recycling of its argument against *Monell* municipal liability. Reframing the argument in this context does not change the Court's analysis of that issue.

1. Equal Protection.

Next, the Defendants argue that it would be unconstitutional to use federal statutes to condemn wholly constitutional activity. (Docket # 32, at 17.) Transposing those two negative concepts into one positive statement, the Court understands the Defendants to say that the citizens' petition for redress of grievances and the City's consequent actions are, as a matter of law, constitutionally permissible.[25]

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[25] Defendants' peculiar challenge to the constitutionality of the Civil Rights and Fair Housing Acts caused Plaintiffs to launch into explanations of first, the methods of proof in a discrimination claims and second, the supremacy of federal laws. (Docket # 50, at 23-25.) While in that section of their brief, the Plaintiffs say little that this Court disagrees with, the Court believes that the Defendants' challenge is more properly interpreted as an assertion that the referendum process is constitutional as a matter of law. It is that interpretation which the Court will analyze.

In support of this notion, the Defendants cite a state court appellate opinion and a decision of the United States Supreme Court, *James v. Valtierra,* 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971).[26]

In *Valtierra,* the Court considered an equal protection challenge to a provision of the California Constitution which required a referendum on any low income housing project. According to the Court, the record in *Valtierra* would not support a claim that the constitutional provision was aimed at

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[26] The Court thinks it necessary to address one precedent not raised by Defendants. In an earlier opinion, *Ranjel v. City of Lansing,* 417 F.2d 321 (1969), the Sixth Circuit made the overly-broad statement that a referendum "may not be attacked on Equal Protection grounds since it is founded on neutral principles." 417 F.2d at 324. Relying on an opinion of the Supreme Court of California, *Mulkey v. Reitman,* 64 Cal.2d 529, 535, 50 Cal.Rptr. 881, 413 P.2d 825 (1966), the Sixth Circuit held that "the better practice was that ... which allowed the election to proceed and ruled on the validity of the measure after its passage." *Ranjel,* 417 F.2d at 325. The *Ranjel* Court reversed a District Court judgment enjoining a citizens' initiative.

> If this Court viewed the instant case as one seeking to prevent an election, the holding here would be much the same. In that case, the Court would follow *Ranjel* and allow the citizens' referendum to take place despite the implications for Plaintiffs' equal protection rights. But in this case, the citizens' democratic rights have already been exercised; the election has been held. (*See supra,* at 12.) Here, no one has prevented the citizens' from voting, rather the Plaintiffs challenge the constitutionality of the actions of the Defendants who gave effect to the allegedly improperly motivated petition. That challenge is properly before the Court.

a racial minority. *Id.* at 141, 91 S.Ct. at 1333-34. Nonetheless, the plaintiffs in that case argued that the mandatory referendum procedure was unconstitutionally discriminatory on its face because it disadvantaged persons desiring public housing more than it did other groups. *Id.* at 142, 91 S.Ct. at 1334. Noting that the procedure ensured a voice to all members of the community on a decision that could "lead to large expenditures of local governmental funds for increased public services and to lower tax revenues," *id.* at 143, 91 S.Ct. at 1334, the Court rejected the plaintiffs' argument. The Court concluded that the democratic decisionmaking which a referendum embodies would not "deny any person 'the equal protection of the laws.' " *Id.*

In the instant case, one of the constitutional grounds asserted by the Plaintiffs is that by giving effect to the petition of its citizens the City denied equal protection of the laws to lower-income families with children. (Complaint Count 3, pp 40, 41.) This is essentially the same claim that was rejected by the Supreme Court in *Valtierra*. Because the Supreme Court has definitively stated that a referendum on the building of a low-income housing project is rationally related to legitimate state interests, and because families are not entitled to a more deferential equal protection standard, the Court must grant the Defendants' motion for summary judgment on Plaintiffs' count three.

Nonetheless, while this Court shares the Supreme Court's belief that referenda can be seen as the embodiment of the democratic ideals upon which this country was based, this Court also appreciates that the framers of the Fourteenth Amendment took pains to prevent the rights of a racial minority from being thwarted by the less then compelling whims of the majority. Indeed, in another context the

Supreme Court has said that a "citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth General Assembly of Colo.*, 377 U.S. 713, 735-36, 84 S.Ct. 1459, 1473-74, 12 L.Ed.2d 632 (1964) (finding referendum on state apportionment of legislature has no constitutional significance if it does not satisfy equal protection requirements); *see also City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676, 96 S.Ct. 2358, 2363, 49 L.Ed.2d 132 (1976) ("If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction."); *Hunter v. Erickson,* 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed.2d 616 (1969) ("The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.").

If the Plaintiffs can demonstrate discriminatory intent or purpose, they will demonstrate a violation of the Equal Protection Clause, no matter the traditional reference to referenda. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68, 97 S.Ct. 555, 562-65, 50 L.Ed.2d 450 (1977). Here, the Plaintiffs have attempted to provide evidence that the City furthered racial discrimination when it gave effect to the citizens' petition and consequently denied African-Americans the opportunity to live in the proposed low-income housing project. The substance of Plaintiffs' race-based challenge will be discussed later in this opinion, but it suffices to say that Plaintiffs may state a claim alleging that they were denied the equal protection of the laws by the actions of the Defendants. Cloaking the denial of Plaintiffs' requested permits in the vestments of democracy does not immunize it from

constitutional challenge.

2. Due Process.

Defendants also refute Plaintiffs' due process-based allegation that the City somehow delegated zoning power to its citizens. The Supreme Court considered a similar claim in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). There, a developer challenged a city charter amendment which required that any rezoning action be ratified by 55% of the voters in a referendum. In rejecting the developer's due process challenge, the Supreme Court found that citizen referenda are reservations of power important to the democratic foundation of our system of government. *Id.* at 672-73, 96 S.Ct. at 2361-62.[27] The Court went on to explain

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[27] The *Eastlake* Court explained that

> "[a] referendum cannot ... be characterized as a *delegation* of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create.... In establishing legislative bodies, the people can *reserve* to themselves power to deal directly with matters which might otherwise be assigned to the legislature. *Hunter v. Erickson*, 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed.2d 616 (1969)."
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> "The reservation of such power is the basis of the town meeting, a tradition which continues to this day in some states as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' *James v. Valtierra*, 402 U.S. at 141 [91 S.Ct. at 1333-34]." *Eastlake*, 426 U.S. at 672-73,

that "[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth amendment when applied to a rezoning ordinance." *Id.* at 679, 96 S.Ct. at 2364-65. The Supreme Court concluded that because the rezoning decision was properly reserved to the people, it was constitutional to permit the voters to decide whether to effectuate the plaintiff's proposed rezoning plan. *Id.*

Just as interesting as the *Eastlake* Court's holding, perhaps, is the topic which the Court expressly did not address. The Court found it significant that *Eastlake* was not a case of a zoning action "denigrating the use or depreciating the value of land; instead, it involves an effort to change a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council." *Id.* at 679 n. 13, 96 S.Ct. at 2365 n. 13. Moreover, the majority noted that the plaintiffs could seek variances if they encountered unnecessary hardship. *Id.* The instant case is thus easily distinguished from that considered by *Eastlake*. Here the Plaintiffs are not seeking to change a reasonable zoning restriction, instead they are challenging a referendum concerning whether they themselves are allowed to enjoy the rights created by an already-existing zoning scheme. These Plaintiffs cannot seek a variance from unnecessary hardships; instead the citizens of Cuyahoga Falls sought and obtained a variance from the uniform application of the zoning laws. Thus, whatever insights can be drawn from *Eastlake*, it is clear that it is not, nor does it profess to be, on all fours with the claims advanced by these Plaintiffs. The *Eastlake* opinion simply does not contemplate the facts of

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96 S.Ct. at 2361-62 (footnotes omitted; italics added).

this case.

Comparatively, the facts of this case are similar to the facts which the Fifth Circuit confronted in *Wheeler v. City of Pleasant Grove,* 664 F.2d 99 (1981), *cert. denied,* 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982). The Plaintiffs in *Wheeler* were apartment developers who were issued a building permit to construct an apartment complex. *Id.* In reliance upon that permit, the plaintiffs initiated preparatory work on the project. *Id.* at 100. As news of the impending construction spread throughout Pleasant Grove, citizen opposition mounted and was ultimately reflected in a referendum which demonstrated "an overwhelming resistance to the proposed apartment complex." *Id.* Consequently, the city adopted a new ordinance which forbade the building of any apartment complexes in town, and which, therefore, prohibited the plaintiffs from building their apartment complex. *Id.* The Fifth Circuit upheld the district Court's holding that the implementation of the new ordinance was arbitrary and capricious and that it was specifically intended to prevent the plaintiffs from exercising their building permit. *Id.*

In the instant case, there is substantial evidence on the record that the Plaintiff developers met all legal requirements for their site plan. Indeed, the Planning Commission approved the request, (Complaint at ¶ 17; Tr. at p. 35), and although it was obviously politically unpopular, the City Council affirmed the site plan ordinance. (Complaint at ¶ 19; Tr. at p. 43). The evidence also demonstrates that the Mayor himself, although opposed to the ordinance, (*see e.g.* Tr. at p. 43; Plaintiffs' ex. G), eventually "pocket approved" it. The public opposition to the proposed apartment complex was indisputably substantial and it manifested itself in a citizens'

petition which first, caused the City to deny Plaintiffs the necessary site plan approval, and second, caused a referendum which ultimately overrode the vote of Council and denied these Plaintiffs the effectiveness of the site plan. The Plaintiffs now request this Court to apply the analysis used by the Fifth Circuit in *Wheeler* to conclude that the reasons for the denial of the ordinance of "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" of the community. *Wheeler,* 664 F.2d at 100 (quoting *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)).[28]

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[28] Two years after its decision in *Euclid,* the Supreme Court applied this holding to the application of a city ordinance which provided that in order to operate a "philanthropic home for children or for old people," the trustee must first obtain written consent from "the owners of two-thirds of the property within four hundred feet of the proposed building." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 118, 49 S.Ct. 50, 51, 73 L.Ed. 210 (1928). The Supreme Court acknowledged that *Euclid* required that "in its general scope" the ordinance must be held valid, but nonetheless found that the *Roberge* delegation of zoning power to a narrow segment of society was repugnant to the Due Process Clause. *Id.* at 122-23, 49 S.Ct. at 52. The Court found it particularly troubling that the decision of the neighboring landowners was "uncontrolled by any standard or rule prescribed by legislative action," and that the trustee was "bound by the decision or inaction of such owners.... [T]heir failure to give consent is final." *Id.* at 122, 49 S.Ct. at 52. *See also Eubank v. City of Richmond,* 226 U.S. 137, 143-44, 33 S.Ct. 76, 77, 57 L.Ed. 156 (1912) (holding that delegation of the power to determine use of property to two-thirds of neighbors is arbitrary and capricious, and unreasonable exercise of police power).

Although not controlling, an opinion by Chief Judge Peter Dorsey of the District of Connecticut is helpful in understanding the propriety of Plaintiffs' request. In *TLC Development, Inc. v. Town of Branford,* 855 F.Supp. 555 (D.Conn.1994), Chief Judge Dorsey was confronted with a situation in which a builder had requested a site plan which could only be denied "if it fail[ed] to comply with requirements already set forth in the zoning ... regulations." *Id.* at 557 (quoting Conn.Gen.Stat. § 8-3(g)). The defendant town nonetheless denied approval of the plaintiff's site plan because of reasons other than those specifically articulated by law. Judge Dorsey held that "there was no basis *in the law* for the denial." *Id.* at 558 (italics added). He explained that "[A] town, through its Commission, cannot arbitrarily refuse to permit a landowner to use land if the proposed use comports with the uses permitted in the district in which the land is located. By articulating the uses permitted in a district, a town has fixed the uses which accommodate all the considerations permitted by the law in adopting a town plan. Once it has done so, a town cannot prevent a permitted use based on factors which might have been, or were, considered in deciding the uses permitted in the zoning district." *Id.* In essence, Judge Dorsey found that it was rational for the Town to consider factors such as traffic, parking, and safety when making zoning decisions. But once that zoning decision has been made, it would be arbitrary and irrational to deny a site plan which actually conforms to that zoning decision, especially if the reasons for denial are the previously-addressed and decided traffic, parking, and safety concerns.

Similarly, the Defendants in the instant case enumerate a number of "rational" reasons for regulating the Plaintiff developer's land. But, as Judge Dorsey said in *TLC,* "That

is not the question presented." *Id.* at 558. Rather, the focus of this Court's inquiry is whether there is a rational basis *in the law* for the denial. Seen in a light favorable to Plaintiffs, the evidence in this case indicates that there was no such rational basis in the law. (Testimony of Planning Director Louis F. Sharpe, Tr. at 150, 156-57.) It follows that the Plaintiff developers have stated a claim that the denial of the site plan and building permits was arbitrary and capricious in violation of the Due Process Clause of the Fourteenth Amendment.

This conclusion is in conformity with Sixth Circuit due process precedent. In 1992, the Sixth Circuit explained what it terms to be the "many meanings of substantive due process." *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1216-17 (6th Cir.1992). First, the Circuit offered this general definition: Substantive due process is "[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed...." *Id.* at 1216 (citations omitted). The Sixth Circuit then explained that chief among the rights protected by substantive due process is "[t]he right not to be subject to 'arbitrary or capricious' action by a state either by legislative or administrative action ..." *Id.* at 1216-17. The *Pearson* Court explains that when reviewing state administrative actions, federal courts can make an extremely limited review of the evidence to determine if the decisionmaker took a substantial departure from accepted norms; when reviewing legislative acts, the inquiry is further limited to whether the legislative action is rationally related to any legitimate state land use concern. The parties in the instant case have correctly treated the decisions to stay the effect of the site plan ordinance and to deny the Plaintiffs'

building permits as administrative actions, thus the Court should apply the deferential administrative standard to the case at hand. In effect, the Court should determine whether there was a basis *in the law* for the Defendants' actions.

As stated above, the Court finds that there is evidence in the record to support Plaintiffs' claim that there was no basis in the law for Defendants' actions. Plaintiffs have presented evidence that indicates that their proposed site plan comports with the present zoning classification. It is thus Plaintiffs' contention that there is no rational basis *in the law* for the denial, (*see Wheeler,* 664 F.2d at 100; *TLC,* 855 F.Supp. at 558), and that by giving effect to the citizens' petition, that is, by denying Plaintiffs the benefit of the site plan ordinance, the Defendant City has engaged in the arbitrary, irrational and therefore unconstitutional application of the law.[29] Without

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[29] An earlier Sixth Circuit opinion considering *a procedural* due process claim, *Brookpark Entertainment, Inc. v. Taft,* 951 F.2d 710 (1991), *cert. denied,* 506 U.S. 820, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992), is analogous to the case at hand. In *Brookpark,* the Sixth Circuit struck down Ohio's former "Particular Premises Local Option" statute which allowed voters to target and ultimately divest particular establishments of their liquor licenses. After noting that the *Brookpark* plaintiffs had a property interest in their liquor licenses, *Brookpark,* 951 F.2d at 716, the Court held that the social regulation was demonstrably arbitrary or irrational, and therefore denied the Plaintiffs of property without due process of law. *Brookpark,* 951 F.2d at 716; *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). The *Brookpark* Court reiterated the concern expressed by the Seventh Circuit's Judge Posner, "that the voters might 'gang up' to drive

deciding the issue, the Court simply states that Plaintiffs have presented sufficient evidence to support such a due process claim brought pursuant to Section 1983. Accordingly, the Defendants' motion for summary judgment on this count is denied.

E. Intent to discriminate.

The only other substantive argument offered by Defendants against the Plaintiffs' Equal Protection and Fair Housing claims is that the Plaintiffs have failed to present evidence which could demonstrate that the site plan and building permits were denied for discriminatory reasons. (Docket # 32, at 14.) The Defendants offer several reasons why "reasonable minds could only conclude that the City acted with non-discriminatory reasons." (Docket # 32, at 14.) First, the Defendants note that the Planning Commission, the City Council, and the Mayor all effectively approved the project, and that the Clerk of Council merely followed the plain language of the City Charter when he referred the

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out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest." *Brookpark,* 951 F.2d at 716 (quoting *Philly's v. Byrne,* 732 F.2d 87, 90 (1984)). According to Judge Posner, "This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent...." *Philly's,* 732 F.2d at 90; *Brookpark,* 951 F.2d at 716. Based on this understanding of the law of procedural due process, the Sixth Circuit held that a statute which allows for the "arbitrary targeting" of a "particular premises" facially violates the Due Process Clause of the Fourteenth Amendment. *Brookpark,* 951 F.2d at 715. Here, the Plaintiffs' argument is that the citizens of Cuyahoga Falls "ganged up" to prevent them from building their low-income housing project for reasons unrelated to the consideration of a site plan ordinance.

petition to the Board of Elections for a referendum. Further, Defendants argue that City Engineer Dzurilla was only following the City Law Director's interpretation of the law when he refused to issue the Plaintiffs' building permits. Finally, the Defendants argue, the building permits could not be issued until the Plaintiffs constructed a substantial fence and associated mounding. Because the fence was never built, the building permit could not legally issue.[30] Based upon this understanding of the context, the Defendants believe that Plaintiffs cannot possibly prove the discriminatory intent essential to the FHA and Equal Protection claims.

Plaintiffs disagree. First, Plaintiffs note the oft-repeated adage that local government officials seldom state outright their discriminatory motives. (Docket # 50, at 19 (citing *Smith v. Town of Clarkton,* 682 F.2d 1055, 1064-65 (4th Cir.1982)).) Nonetheless, Plaintiffs acknowledge that they must present some proof of racially discriminatory intent or purpose to establish an equal protection claim. *See Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977). In the typical equal protection challenge to governmental action, a plaintiff will attempt to establish the city's intent to discriminate by offering proof of four objective factors that have been found to be probative of racially discriminatory intent:

(1) the racial impact of an official action;

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[30] See the Court's rejection of this argument in the ripeness section *supra*. The Court's analysis applies equally well in this context.

(2) the historical background of the decision;

(3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms; and

(4) the legislative or administrative history of the decision.

United States v. City of Birmingham, Mich., 727 F.2d 560, 565 (6th Cir.), *cert. denied,* 469 U.S. 821, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984) (citing *Arlington Heights,* 429 U.S. at 266-67, 97 S.Ct. at 563-65) ("No single factor may be dispositive of this decision.").

In the instant case, the Plaintiffs have alleged that the government is giving effect to a petition (and thus also to the motivations) of its citizens. This Court is therefore confronted with "governmental action" that incorporates the actions and motivations of private citizens. Therein lies the dilemma, because although *Arlington Heights* teaches us to look at the context of the dispute, Sixth Circuit precedent advises against inquiring into the motivations of the electorate. *Arthur v. City of Toledo, Ohio,* 782 F.2d 565 (6th Cir.1986). An explanation may be in order.

In *Arthur v. City of Toledo, Ohio,* the Sixth Circuit considered a challenge to a referendum in which the voters repealed sewer extension ordinances which had been approved by their city council and which would have benefitted two low-income public housing projects. 782 F.2d 565. The Circuit first explained the lessons of *Hunter v. Erickson, James v. Valtierra, Arlington Heights,* and *Washington v. Seattle School District No. 1,* 458 U.S. 457,

102 S.Ct. 3187, 73 L.Ed.2d 896 (1982),[31] in which the Supreme Court balanced the democratic ideals embodied in referenda, with the people's right to the equal protection of the laws. After dutiful consideration of these and other substantial precedents, the Sixth Circuit held that "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." *Arthur,* 782 F.2d at 574; *see also United States v. City of Birmingham, Mich.,* 727 F.2d 560, 564 (1984), *cert. denied,* 469 U.S. 821, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984) ("We do not read the opinion of the district court as dependent upon the motivation of voters in this referendum for its decision.").

Straight application of the *Arthur* holding to the case at hand might bar the Court from inquiring into the motivations of the citizen petitioners,[32] but the Court sees a distinction

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[31] In *Washington,* the Supreme Court held unconstitutional a statewide voter initiative designed to terminate the use of mandatory busing for purposes of racial integration in Washington's public schools. *Id.* While the initiative was facially neutral, the Court concluded that the initiative improperly reallocated "the authority to address a racial problem--and only a racial problem--from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474, 102 S.Ct. at 3197.

[32] Here, the Plaintiffs do not dispute that the site plan ordinance was facially race-neutral. Rather, the Plaintiffs argue that their right to the equal protection of the laws was violated because the City gave effect to the racially discriminatory will of its citizens. Applying the *Arthur* holding to this argument, the court would ask if racial bias is "the only possible rationale" for the citizen's

between inquiring into the thoughts of the voter at the voting box, and recognizing the stated motivations of citizens at public meetings and of those who organize and effectuate a petition drive. Where the former would involve the scrutiny of "people acting in a legislative capacity," the latter is simply an attempt to "gather additional information concerning the

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petition to which the Defendants gave effect. The answer to this question would surely be no. Other possible rationales for the citizens' petition (and subsequent referendum) include, for example, concern about the effect of low-income housing on property values of surrounding properties, or worries over increased demand on public services or schools.

Indeed, as far as this Court can tell, there will always be another non-race-based rationale for a referendum, and thus a court in the Sixth Circuit will never be able to inquire into the electorate's motivations. Even the factual scenario encountered by the Supreme Court in *Washington v. Seattle School District No. 1* would not survive the Sixth Circuit's strict test: while in *Washington,* the Supreme Court found that the facially neutral initiative "was effectively drawn for racial purposes," it also acknowledged the district court's finding "that voters were moved to support [the initiative] for 'a number of reasons,' so that it is impossible to ascertain all of those reasons or to determine the relative impact of those reasons upon the electorate." *Washington,* 458 U.S. at 464, 102 S.Ct. at 3192. If the *Washington v. Seattle School District No. 1* scenario took place within the jurisdictional boundaries of the Sixth Circuit today, the district court would not be allowed to make an inquiry into the racial basis for the initiative because of the District Court's acknowledgment that the rationales of the electorate were many and varied; Washington's anti-desegregation referendum would still be good law.

basis of opposition to the [ordinance]." *United States v. City of Birmingham, Mich.*, 538 F.Supp. 819, 829 (1982). True to the democratic ideals enunciated in *Arthur*, the Court will not interpret the words of a few as the will of the many, but will consider the stated motivations of some citizen petitioners as one factor in the broad context in which this dispute arose.

That groundwork having been laid, the Court has little trouble concluding that, when viewed in a light most favorable to the Plaintiffs, there is some evidence which would support Plaintiff's race-based equal protection claim. That is not to say that the Court finds that the evidence is of such strength that it compels an injunction in Plaintiffs' favor--that is not the question here--but the evidence is certainly sufficient to allow Plaintiffs' claim to survive summary judgment. The parties will be expected to present their views of that evidence, and its relevance to the *Arlington Heights* framework for establishing intent, at the trial.

Although this analysis also has serious implications for the efficacy of Plaintiffs' Fair Housing Act claims, the Court will address those claims separately. The Fair Housing Act, 42 U.S.C. § 3601, et seq., states that "it is unlawful to ... make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a); *see also* 42 U.S.C. § 3617. Familial status is defined as "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals...." This section has been held to apply to municipalities. *United States v. City of Parma, Ohio,* 661 F.2d 562 (6th Cir.1981).

One part of Plaintiffs' FHA claim asserts that by staying

the effectiveness of the site plan ordinance and consequently refusing to grant building permits pursuant to that ordinance, the city is giving effect to the anti-family and anti-minority biases of the citizen petitioners, and therefore violating § 3604(a) by making dwellings unavailable to potential home builders/buyers based on their race and on whether they have children under 18 years of age.

Again, Defendants only challenge the Plaintiffs' ability to prove discriminatory intent (the first requirement to be met in a discrimination claim). Plaintiffs attempt to satisfy their burden of proof on this question in two ways. First, they argue that intent can be shown pursuant to the same *Arlington Heights* analysis used to evaluate their equal protection claim. *See also Smith & Lee Assoc. v. City of Taylor, Mich.*, 13 F.3d 920, 927-28 (6th Cir.1993). The Court has already ruled that under this analysis there is sufficient evidence to create an issue of fact concerning whether discriminatory intent played a part in the injury allegedly suffered by Plaintiffs. While that ruling concerned Plaintiffs' race-based equal protection claim, a review of the evidence reveals a similar question of fact concerning the role of anti-family bias in the denial of Plaintiffs' site plan and requests for building permits. This alone is sufficient reason to deny Defendants' motion for summary judgment on Plaintiffs' fair housing claim.

However, the Court deems it wise to explain the alternative argument of the Plaintiffs that should they not succeed in satisfying the terms of the *Arlington Heights* analysis, they can demonstrate that the Defendants' actions have a disparate impact upon African-Americans and families. (Docket # 50, at 17-18 (citing *Arthur v. City of Toledo,* 782 F.2d 565 (6th Cir.1986); *Metropolitan Housing Development*

Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir.1977), *cert. denied,* 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978)).) While it is true as Plaintiffs claim that under the Fair Housing Act, "even practices which unintentionally cause a disparate impact upon a protected class can be held unlawful[,]" the Court directs Plaintiffs' attention to the *Arthur* Court's holding that "absent highly unusual circumstances, the discriminatory *effect* of a referendum cannot establish a violation of the Fair Housing Act." *Arthur,* 782 F.2d at 575 (emphasis added). Although we cannot be certain what the Sixth Circuit meant by "highly unusual circumstances," we know that a Court should consider the following three factors:

> (1) the strength of the plaintiff's showing of discriminatory effect;
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> (2) the defendant's interest in taking the action complained of; and
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> (3) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Arthur, 782 F.2d at 575 (refusing to adopt Seventh Circuit's "discriminatory intent" factor because plaintiffs should not receive "half-credit" for failing to satisfy *Washington v. Davis* constitutional standard). Needless to say, this legal path takes Plaintiffs on an uphill climb. While Defendants unsuccessfully challenge the Plaintiffs' ability under the law to assert a disparate impact claim, they have not challenged the Plaintiffs' ability on the facts of this case to satisfy the *Arthur* criteria, thus the Court will leave for a

future date consideration of the evidence under this analysis.

Similarly, Plaintiffs' claim based on the Fair Housing Act, 42 U.S.C. § 3617, survives Defendants' motion for summary judgment. Section 3617 provides that

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the Fair Housing Act].

42 U.S.C. § 3617. The Sixth Circuit has interpreted this provision as restricting those "who are in a position directly to disrupt the exercise or enjoyment of a protected right and [who] exercise their powers with a discriminatory animus." *Michigan Protection and Advocacy Serv., Inc. v. Babin,* 18 F.3d 337, 347 (6th Cir.1994). "Under this standard, the language 'interfere with' encompasses such overt acts as racially-motivated firebombings, ... sending threatening notes, ... and less obvious, but equally illegal practices such as exclusionary zoning, ... deflating appraisals because of discriminatory animus, ... and insurance redlining...." *Id.* (citations omitted). In the instant case, Plaintiffs argue that the Defendants discriminatorily denied them of the site plan and building permits to which they were entitled due to the race and familial status of the project's future tenants. The ultimate determination of this issue depends on the same type of sensitive factual inquiry which the Court discussed above, and thus, the Court's conclusion is here the same: Plaintiffs have presented evidence which, when viewed in a light most favorable to them, could establish the claim asserted. Defendants' motion for summary judgment on this ground is

also denied.

VII. Mayor Robart, Individually.

According to the Plaintiffs, the Mayor violated their rights to Due Process and Equal Protection as protected by 42 U.S.C. Sections 1981, 1982, and 1983, and those rights protected by the Fair Housing Act. (*See* Complaint.) The actions of the Mayor which the Plaintiffs challenge include his express opposition to the Plaintiffs' proposed housing project, attendance at and alleged contributions to several meetings of citizens opposed to the project, and certification of the citizens' referendum opposing the project. (Docket # 49.) In his motion for summary judgment Mayor Robart offers at least four separate grounds which he believes entitle him to relief. The first, res judicata, has been discussed above. The second through fourth bases for the Mayor's motion include the doctrine of qualified immunity, the Mayor's assertion of an absolute privilege, and the assertion by the Mayor that Plaintiffs can offer no evidence that the Mayor in any way caused their alleged harms.

"Qualified or 'good faith' immunity is an affirmative defense that is available to government officials performing discretionary functions." *Rich v. City of Mayfield Heights,* 955 F.2d 1092, 1095 (6th Cir.1992). A state official is entitled to qualified immunity if his allegedly unlawful conduct was objectively reasonable when considered in light of the legal rules that were clearly established at the time the challenged conduct was taken, and of the information possessed by the official. *Id., quoting Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). A plaintiff bears the ultimate burden of showing that the defendant is not entitled to qualified immunity once

the defendant has presented facts to suggest that his actions were in fact performed within the scope of his authority, *Rich,* 955 F.2d at 1095.

Thus, when faced with a motion for summary judgment based on qualified immunity, a court must consider the following two issues:

> (1) whether the plaintiff has asserted a violation of [a] known civil constitutional right; and
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> (2) whether the constitutional rights was so clearly established at the time in question that a reasonable official in the defendant's position would have known that he was violating the plaintiff's constitutional rights.

Hutsell v. Sayre, 5 F.3d 996, 1003 (6th Cir.1993) (Suhrheinrich, J.), *cert. denied,* 510 U.S. 1119, 114 S.Ct. 1071, 127 L.Ed.2d 389 (1994), *citing Siegert v. Gilley,* 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). If either question in the two part qualified immunity analysis is answered in the negative, summary judgment must be granted to the state actor as a matter of law.

In the present cause, the Court has already determined that Plaintiffs have asserted violations of their known federal rights pursuant to Section 1983, and the FHA. It is now left for this Court to determine whether the right was clearly established in May of 1996, that is, whether "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he [was] doing violates that right ..." *Anderson,* 483 U.S. at 640, 107 S.Ct. at 3039. This determination depends on whether there is controlling precedent in the Sixth Circuit or the Supreme Court of the

United States. *Marsh v. Arn,* 937 F.2d 1056 (6th Cir.1991); *Black v. Parke,* 4 F.3d 442, 445 (6th Cir.1993).

First, the Court must determine which conduct of the Mayor is actionable. Certainly, all of the claims brought by Plaintiffs against the Mayor in his individual capacity hinge on the Plaintiffs' ability to show that the Mayor actually did something which caused them harm. A review of the evidence cited by Plaintiffs reveals that there is no proof that the Mayor contributed to the referendum process aside from lending support by answering some procedural questions. Eventually, when the view of the electorate became obvious, he amplified their opposition to the project and, indeed, encouraged the City Council to oppose it "with vigor." (Robart depo. p. 63-5.) He suggested finding a legal way to preclude building the project; he advised that denying the permit would cause expensive delay which could work to the city's advantage. However, when push came to shove, that is, when Council ignored his advise and approved the site plan in question, the Mayor declined to exercise his veto power, instead allowing the ordinance to take effect without having to express any official approval or disapproval of it whatsoever.

Mayor Robart's position on the project admittedly shifted during the proceedings leading to the referendum, but at the critical time when he could have either directly helped or hurt the Plaintiffs' cause, the Mayor avoided taking any action and, instead, allowed the Plaintiffs' site plan ordinance to take effect due to his pocket approval. The facts in evidence do *not* sustain Plaintiffs' unsupported assertions that the Mayor organized the petition drive in question, that he secured meeting places for the citizen group opposed to the project, that he certified the petition, or that he submitted the

referendum question to the Board of Elections.

There does appear to be a question, however, concerning whether the Mayor caused the denial of Plaintiffs' request for a site plan or building permits. According to the Mayor, he asked the City Service Director to circulate a memo requesting that building permits not be issued to the Plaintiff developers. (Docket # 34, at 4, 8 (Robart aff. ¶ 15).) While the City Law Director had already issued a similar memorandum, the Court cannot help but conclude that there is a question of fact concerning whether the Mayor's memo was a cause of the denial of the Plaintiffs' building permits. It is this act of Mayor Robart, ordering the issuance of the memo, which the Court will analyze to determine if a reasonable official in the Mayor's position would understand that what he was doing violated the Plaintiffs' constitutional rights. *See Anderson,* 483 U.S. at 640, 107 S.Ct. at 3039.

The Court concludes that based on existing Supreme Court and Sixth Circuit precedent, a reasonable official would not necessarily understand the ramifications of his act on the federal rights of others.[33] That is, the Court finds that although the precedent might indeed compel a conclusion that the actions of the Defendants violated the federal rights of the

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[33] By "federal rights" the Court means to include the rights of Plaintiffs as protected by the Fair Housing Act. Just as there is no controlling precedent which directly provides the answer to the Mayor's constitutional dilemma, there is none which adequately explains the interplay between the Fair Housing Act and the right of the people to referenda. In short, the Mayor's denial of the Plaintiffs' requested building permits was not obvious under controlling precedent, and thus the Mayor may have reasonably believed that he was behaving lawfully. He is qualifiedly immune from Plaintiffs' Fair Housing claims.

Plaintiffs, no opinions of the Circuit or Supreme Court address the unique factual scenario which is now before the Court: a challenge to a city's arbitrary refusal to give effect to a site plan or issue building permits due to the alleged biases of citizen petitioners. Indeed, as the discussion above demonstrates, this dispute falls squarely in the middle between caselaw affirming the rights of citizens to referenda and other caselaw upholding the rights of individuals to be free from the arbitrary and irrational whims of the majority. A reasonable official in the Mayor's position might not have known that his actions affected the constitutional rights of others as those rights have been explained by the Supreme Court and the Sixth Circuit, and indeed, under a certain reading of the caselaw the Mayor might have felt that his actions were lawful. The Court, therefore, concludes that Mayor Robart is entitled to qualified immunity on Plaintiffs' claims against him in his individual capacity. Mayor Robart's motion for summary judgment is granted.

VIII. Conclusion.

The motions before the Court are those of the Defendants for *summary judgment*. As the parties are well aware, when considering such a motion, it is imperative for the Court to consider all of the evidence in a light most favorable to the non-moving party, here the Plaintiffs. After viewing the evidence in this manner, the Court agrees with the Defendants that they are entitled to judgment as a matter of law on two questions: first, the Court grants Defendants' motion insofar as it challenges Plaintiffs' non-race-based equal protection claim; second, because Defendant Robart is entitled to qualified immunity, Plaintiffs may not proceed against him in his individual capacity; the Mayor's motion for summary judgment is granted.

As for the balance of Defendants' motion, the Court finds that Plaintiffs have provided evidence which, if viewed in their favor, could demonstrate claims founded in due process, as well as claims based upon Plaintiffs' right to the equal protection of the laws as guaranteed by the Fourteenth Amendment, Section 1983, and the Fair Housing Act. This order does not contemplate whether Plaintiffs will ultimately succeed in their claims, rather it merely states that Plaintiffs should be afforded a trial at which they could fairly pursue them.

The legal controversy now before the Court is no simpler now than it was when first confronted by the City of Cuyahoga Falls in the spring of 1996. When deciding whether to give effect to its citizens' petition, the City of Cuyahoga Falls stood at the intersection of two concepts essential to our constitutional democracy: the rights of its citizens to self-government, that is, their right to challenge by petition and referendum the decisions of their elected representatives; and the rights of the Plaintiffs to the equal and non-arbitrary application of the laws. This Court now stands at that same crossroad, and is charged with reconciling those basic principles. It is hoped that, with the help of the parties, that reconciliation may soon be achieved.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT,
N.D. OHIO,
EASTERN DIVISION

February 14, 1997

No. 5:96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs,

v.

CITY OF CUYAHOGA FALLS, et al.,
Defendants.

REPORT AND RECOMMENDATION

Magistrate Judge James Thomas

I. Introduction.

The above-referenced matter has been referred to the undersigned for a report and recommended decision on Defendants' pending motions for summary judgment (Docket Nos. 32 and 34). (See Order of November 21, 1996, Docket No.65).

This action involves the proposed development of a seventy-two unit apartment complex in the City of Cuyahoga Falls, Ohio. This is the second action involving this proposed development. The proposed development was the subject of a state suit filed on May 1, 1996, in Summit County Court of Common Pleas by the majority of the Plaintiffs before this court, including the project developer, Buckeye Community Hope Foundation. The present action was filed on July 5, 1996, by the developer, and others, after an unsuccessful attempt before the state court to halt a referendum effort in the City of Cuyahoga Falls to reverse the City's approval of the development. Plaintiffs in this action claim, *inter alia*, that the actions of the City, City officials, the Summit County Board of Elections, and the Mayor of Cuyahoga Falls in his individual capacity, violated Plaintiffs' rights under the Fair Housing Act, 42 U.S.C. 3601, *et seq.*, and other provisions of federal law.

For the reasons that appear below, the present suit was the subject of a prior state court action and is barred, on grounds of *res judicata*, as between the parties to this suit who were also parties to the state court action. Further, despite the presence of additional parties in this suit, the case should be dismissed in its entirety.

II. Background.

There are two areas of background relevant to the consideration of the pending motions: (1) the facts leading up to the proposed development, referendum and filing of this action; and (2) the procedural context of this action. The two areas are discussed separately below. Initially, however, one procedural matter warrants an introduction here.

United States District Judge Sam H. Bell conducted a

three day hearing on Plaintiffs' motion for preliminary injunction in November of 1996. This was the second hearing on Buckeye Community Hope Foundation's request for injunctive relief; a preliminary injunction hearing was also held in the state action. Plaintiffs' motion for injunctive relief filed in this court was denied on December 13, 1996. (Docket No. 78). On the motion of Plaintiffs, the transcript of those proceedings has been accepted for consideration in connection with the pending motions for summary judgment. (See Order of January 22, 1997, Docket No. 84). The three volume transcript was received by the undersigned on January 29, 1997 and has been considered in connection with the pending motions and is cited herein, in addition to the other evidentiary materials submitted by the parties.

A.

For purposes of background, the undersigned has relied upon, to the extent available, evidence offered by Plaintiffs because of the need, when considering a motion for summary judgment, to view the facts in the light most favorable to the non-moving party, *i.e.*, Plaintiffs. Specific areas of dispute are discussed in the report and recommendation as relevant.

* * *

Plaintiff Buckeye Community Hope Foundation ("Buckeye Community Foundation") is a not-for-profit 501(c)(3) corporation. (Hearing Transcript, November 19, 20, and 21, 1996 ("Tr.") at pp. 11-13). It has as its purpose the development of affordable housing through the use of low income housing tax credits. (*Id.*) Mr. Boone is the President of the Board of Trustees for Buckeye Community Foundation. (Tr. at p. 11).

Prior to the development of the complex in question here, Buckeye Community Foundation developed at least four other affordable housing complexes in Ohio. (Tr. at p. 15). As outlined at the hearing before Judge Bell by Mr. Boone and the Executive Director for Buckeye Community Foundation, Mr. P. Barno, Buckeye Community Foundation acts a developer for each project. (Tr. at p. 389). For each project, a separate limited partnership is formed as the investment vehicle to sell the tax credits. In this case, the specific limited partnership is Plaintiff Buckeye Community Three, L.P. ("Buckeye Three. Limited"). (Tr. at p. 23). The limited partnership is the owner of the land and, once it is completed, the development. As the project is developed, Buckeye Community Foundation advances fees and expenses until all the financing, including the tax credits, are finalized.[1] Once the complete financial package is arranged and finalized, Buckeye Community Foundation is reimbursed for its expenses in developing the project. Buckeye Community Foundation also receives a "developer's fee" for its services. In this case, the expected fee is $175,000.00. (Boone Dep. at p. 120; Tr. at p. 381).

To protect each development and its investors, Buckeye Community Foundation also forms a separate corporation to act as the general partner for the limited partnership. (Tr. at pp. 22-23). In this case, Plaintiff Cuyahoga Partners, Inc. ("Cuyahoga Partners"), a for-profit corporation, was formed

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[1] For example, in this case the $10,000 loan commitment paid to the bank by Buckeye Three Limited was advanced by Buckeye Community Hope Foundation. (Tr. at p. 397).

to serve as the general partner of Buckeye Three Limited.[2] (Tr. at p. 23).Mr. Boone is the president of Cuyahoga Partners. (Boone Dep. at pp. 6-7). Buckeye Community Hope Foundation is a fifty-one percent owner of Cuyahoga Partners, and the other forty-nine percent is owned by Little Country Community, Inc., another 501(c)(3) corporation. (Tr. at p. 396).

Thus, Buckeye Community Foundation controls Cuyahoga Partners which in turn controls Buckeye Three Limited.[3] (Tr. at pp. 23,389-390).

* * *

Turning to the events leading to the underlying dispute, Mr. Boone testified that he first contacted the Mayor for the City of Cuyahoga Falls, Donald Robart, in the summer of 1995 about the possibility of developing a low income housing complex in Cuyahoga Falls.[4] Mr. Boone testified that Hearing Exhibit 23 represents a letter from Buckeye Community Foundation to Mayor Robart dated June 7, 1995. In the letter, Buckeye Community Foundation expressed an interest in

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[2] The initial limited partners were RU Management Company and/or Steven Boone individually. (Tr. at p. 398). RU Management Company is "a management company that manages affordable housing in Ohio and elsewhere." (Boone Dep. at p. 7). There is an "understanding" that RU Management Company would manage the complex if it were built. (Tr. at p. 398). RU Management is owned by Mr. Boone. (*Id.*)

[3] Because of the commonality among these parties, at times they are referred to collectively as " Plaintiff Developers. "

[4] Donald Robart is named as a defendant in this action both in his individual and official capacities.

developing the land "under the low income housing tax credit program." (Tr. at pp. 20-21). Mr. Boone indicated that this letter was sent before the purchase of the land for the project. (Tr. at p. 21). According to Mr. Boone, the Mayor expressed no problems about the proposed development at that time. (*Id.*)

The real property, located on Pleasant Meadow Boulevard, was purchased on June 12, 1995. (Complaint at para. 13).

Mr. Boone testified that he started working with Cuyahoga Falls Planning Director, Louis Sharpe, in late August/September of 1995 on the details of the development. (Tr. at pp. 30-31). The financing for the project was secured in November of 1995. (Tr. at p. 21).

In January, 1996, Buckeye Three Limited, ruled an application for a "site plan review" for the seventy-two unit apartment complex in the City of Cuyahoga Falls. (Complaint at para. 15).

On February 21, 1996, the "site plan" was submitted for approval at a meeting of the Planning Commission for Cuyahoga Falls. (Complaint at para. 17; Tr. at p. 33). In connection with the Planning Commission's meeting, the Planning Director Sharpe prepared a Staff Summary of the site plan. See Hearing Exhibit II; Tr. 128).This summary recommended approval of the site plan subject to approximately nine conditions agreed to by Mr. Boone. One of the conditions required the developers to erect a fence on one side of the property before the building permit for the apartment complex could issue.

The site plan, including the conditions, was unanimously

approved by the Planning Commission at the February 21, 1996 meeting.[5] (Complaint at para. 17; Tr. at p. 35). The Planning Commission's recommendation then had to be submitted to and approved by City Council. (*Id.*) Mayor Robart did not attend the February 21, 1996, Planning Commission meeting. (Tr. at pp. 72-73).

On March 4, 1996, the Planning Commission's recommendation on the site plan was addressed at a City Council meeting. (Tr. at p. 35). Mayor Robart attended this meeting. (Tr. at p. 36). According to Mr. Boone, Mayor Robart "came out against" the project during this meeting and suggested that the issue be tabled. (Tr. at p. 39-40). The issue was tabled.[6] (Tr. at p. 40).

Another meeting of City Council was held on March 18, 1996. (Tr. at p. 40).From a review of the materials filed in connection with the motions, one can conclude that this meeting was long and emotional. The minutes reflect that the meeting lasted from 6: 15 p.m. until 8:45 p.m. and that several residents expressed their concerns over the development of the complex. Mayor Robart attended the March 18, 1996 meeting and expressed his views in a lengthy statement. (Hearing Exhibit 24 at pp. 12-14).

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[5] Hearing Exhibit 11 sets forth the conditions prerequisite to the issuance of the building permit as approved by the Planning Commission and as adopted by City Council. (Tr. at p. 90).

[6] Mr. Boone indicated that while he was not aware of any referendum in the works, he recalled the word being used by the City Law Director at either the March 4 or March 18 City Council meeting. (Tr. at p. 41-42). Mr. Boone testified that the word referendum "went right over my head" and he did not understand what a referendum was until April. (*Id.*)

According to Mr. Boone, Mayor Robart recommended rejecting the project at the March 18, 1996 Council meeting. (Tr. at p. 43). The issue was tabled again. Mr. Boone testified, "I believe they said the reason was because they wanted the law department to provide a legal opinion if there was any possible reason, the way it was put, that they could turn us down legally. " (Tr. at p. 43). Mr. Boone admitted that he raised the Fair Housing Act at the March 18, 1996 meeting. (Tr. at p. 60; Boone Dep. at p. 16).

Another Council meeting occurred on April 1, 1996, and the site plan was approved by vote of six to three. (Complaint at para. 19; Tr. at p. 43). The City Council's approval was expressed in the form of Ordinance No. 48-1996. Ordinance No. 48-1996 states, in pertinent part:

> [t]hat this City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-6-96-SP.

(Hearing Exhibit No.8, Section 1).

Mr. Boone testified that they applied for the building permit about two days after the site plan was approved. (Tr. at p. 44). Upon direct questioning by Judge Bell, Mr. Boone stated that the application was made on either April 3 or 4. (*Id.*) The complaint alleges that the building permit was sought on or about April 5, 1996. (Complaint at para. 29).

Mr. Boone testified that they received the building permit

for the fence in April, 1996. (Tr. at pp. 46-48). Mr. Boone testified that work on the fence did not begin "because it became pretty obvious that we are in a fight, and I wasn't about to --first of all, we don't have the funds to put up a $70,000 fence. If we know we are going to receive with assurity the building permit to build the rest of the project, I — that's basically the reason." (Tr. at p. 48). Mr. Boone further stated that he did not proceed with building the fence because "the rumors of a referendum were very prevalent." (Tr. at p. 92). He testified, "1 felt the reasonable thing to do was to delay the construction of the fence until I was assured we were going to get a building permit. " (Tr. at p. 92).

* * *

Parallel to the site plan approval process, a referendum effort was proceeding. (See Complaint at para. 24).

Mr. Lee Minier is a life long resident of Cuyahoga Falls, Ohio. (Tr. at p. 266).He was called by Plaintiffs to testify at the hearing before Judge Bell. Mr. Minier testified that Hearing Exhibit 19 is a notice for meeting on Tuesday, April 9, 1996 to discuss "taking the ISSUE OF A 72 UNIT HOUSING DEVELOPMENT ON PLEASANT MEADOW BLVD. to the vote of the people of Cuyahoga Falls in November." (Hearing Exhibit 19) (upper case print in original) (Tr. at p. 278-279). The organizing group, as identified on Hearing Exhibit 19, was the" Citizens for the Preservation of Voters Rights." (See Exhibit 19).

Mr. Minier attended the April 9, 1996 meeting. The Mayor also attended the meeting. (Tr. at p. 279). The Mayor spoke at the meeting and stated that he supported the referendum effort. *Id.*) According to Mr. Minier, no City of Cuyahoga Falls officials were asked to sign the referendum

petitions.(*Id.*)

Mr. James Kuzmik, a "tester" for the Fair Housing Advocates Association, also attended the April 9, 1996 meeting. (Tr. at p. 291). According to Mr. Kuzmik, the director of Fair Housing Advocates Association called him and asked him to attend the meeting.[7]) Mr.Kuzmik testified that the referendum process was discussed at this meeting. Mr.Kuzmik was asked, "were there any statements made by members of the Citizens for the Preservation for Voter [Rights,] dealing with children?" Mr. Kuzmik said yes. (Tr. at p. 293). Mr. Kuzmik said he did not recall anyone person leading the meeting. (Tr. at p. 296). On cross examination, Mr. Kuzmik stated that he did not hear Mayor Robart make any discriminatory remarks about African Americans or children at the April 9, 1996 meeting.[8] (Tr. at p. 300).

On or about April 29 or 30, 1996, a referendum petition was submitted to the Clerk of Council, Gregg Wagner.[9] (Complaint at 25; Wagner Affidavit at para. 5). The Board of Elections approved the referendum petition on May 1, 1996. (Complaint at paras. 25 and 26; Wagner Affidavit at 5).

* * *

On May 1, 1996, the state action was filed to enjoin the

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[7] Mr. Kuzmik is not a member of Fair Housing Contact Services. (Tr. at p. 291). Fair Housing Advocates Association is a distinct entity separate and apart from Plaintiff Fair Housing Contact Service.

[8] Mr. Kuzmik's handwritten notes taken during the meeting are at Hearing Exhibit 32. (Tr. at p. 298).

[9] Mr. Wagner is named in this lawsuit as a defendant in his official capacity as the Clerk of Council.

referendum process under Ohio law. The case was captioned: *Buckeye Community Hope Foundation. et al.. v. City of Cuyahoga Falls. et al.*, Case No. CV96-05-1701 (Summit County) (I. Murphy). The named plaintiffs were Buckeye Community Foundation, Cuyahoga Partners, and Buckeye Three Limited, three of the four named plaintiffs in this action. (See "Complaint for Temporary Restraining Order Declaratory Judgment Injunctive Relief," Docket No. 33, Exhibit C). The state court complaint named as defendants: (1) City of Cuyahoga Falls; (2) Cuyahoga Falls City Council; (3) Gregg Wagner, Clerk of City Council, City of Cuyahoga Falls; and (4) Summit County Board of Elections. (Docket No. 33, Exhibit C). With the exception of the Cuyahoga Falls City Council, the same defendants have been named in this action.

On May 15, 1996, Judge Murphy conducted a hearing on plaintiffs' request for preliminary injunction. (Docket No. 33, Exhibit F). At the hearing, plaintiffs presented the testimony of three witnesses: (1) Mr. Boone; (2) Joseph James Orel, President of no Construction, the contractor for the project; (Docket No. 33, Exhibit F, p. 13); and (3) Roy Lowenstein, a representative of Ohio Capital Corporation for Housing. (Docket No. 33, Exhibit F, p. 17). Mr. Boone and Mr. Orel also testified at the hearing before Judge Bell in November, 1996.[10] (Tr. at pp. 11-106; pp. 109-

[10] Several other witnesses testified at the hearing including Louis Sharpe (Tr. at pp. 121-158), Sandra Montgomery (Tr. at pp. 158-164), Crystal Williams (Tr. at pp. 165-169), Kathy Ronca (Tr. at pp. 169-180), Julia Neal (Tr. at pp. 180-185), Gerald Dzurilla (Tr. at pp. 186-198), Dr. Mark Sailing (Tr. at pp. 201-252), George Potts (Tr. at pp. 253-266), Lee Minier (Tr. at pp. 266-288), lames Kuzmik (Tr. at pp. 289-300), Donald Robart

121). The plaintiffs in that action were represented by Edward G. Kramer, who also represents Plaintiffs in this action as well. (Docket No. 33, Exhibit C).

On May 31, 1996, Judge Murphy denied the plaintiffs' motion for preliminary or permanent injunction."[11] (Docket No. 33, Exhibit B). The decision and judgment was "on the merits." (Docket No. 33, Exhibit F, pp. 48-49; also, Attachment to Docket No. 77 — Ninth Appellate District's December 11, 1996 opinion at p. 3 ("The parties agreed to consider the hearing as a trial on the merits of the case.")).

* * *

On June 20, 1996, Mr. P. Gilbertson Barno, Buckeye Community Foundation's Executive Director wrote to City of Cuyahoga Falls and renewed his request for issuance of a building permit. (Hearing Exhibit No.16). On June 26, 1996, Mr. Gerald M. Dzurilla, the City Engineer for Cuyahoga Falls, sent a letter to Mr. Barno and indicated that he could not issue the building permit in light of the pending

(Tr. at pp. 301-338), and Peter Gilbertson Barno (Tr. at pp. 359-404). The testimony of each witness has been read and considered by the undersigned. The relevant testimony is discussed infra to the extent necessary.

[11] Plaintiffs appealed Judge Murphy's decision and on December 11, 1996, the Ninth Appellate District affirmed the decision of the trial court. The record does not indicate whether an appeal of the Ninth Appellate District's December 11, 1996 decision has been taken to the Ohio Supreme Court.

referendum.[12] (Complaint at para. 31 ; Hearing Exhibit No.15).

Plaintiffs filed the present action on July 5, 1996 naming as Plaintiffs the three plaintiffs in the state court action, plus one new Plaintiff, Fair Housing Contact Service. The Defendants in this action are: (.1) City of Cuyahoga Falls; (2) Don Robart, in his individual and official capacity as Mayor of the City of Cuyahoga Falls; (3) Gregg Wagner, in his official capacity as Clerk of City Council; (4) Summit County Board of Elections; and (5) Gerald M. Dzurilla, in his official capacity as Chief City Engineer. (Docket No.1). The new Defendants, *i.e.*, those not named in the prior state suit, are Mayor Robart in his individual and official capacity, and Mr. Dzurilla in his official capacity.

In contrast to the complaint filed in state court, the complaint filed in this court is based upon federal law. The Plaintiffs allege violations of 42 U.S.C. 3601 *et seq.*, 3604, and 3617, 42 U.S.C. 1981 and 1982 (Docket No.1, para. 37); the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. 1983 (paras. 39, 44); and the Equal Protection Clause of Fourteenth Amendment and 42 U.S.C. 1983 (para 41). The complaint filed in the prior state action was based solely on state law.

B.

Before turning to the merits of the pending motions, two procedural matters are relevant to the discussion set forth below.

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[12] Gerald Dzurilla is named in this lawsuit as a defendant in his official capacity as "Chief City Engineer."

First, as noted above, this action was filed on July 5, 1996. Subsequent to the filing of the action the parties engaged in discovery and filed their respective motions for summary judgment and responses thereto prior to the preliminary injunction hearing conducted by Judge Bell on November 19, 1996. Judge Bell issued an order on December 13, 1996 denying Plaintiffs' request for equitable relief primarily on the ground that Plaintiffs failed to establish any irreparable harm.

On December 19, 1996, Plaintiffs filed a motion requesting that the preliminary injunction hearing transcript be submitted as a supplement to the pending motions and further briefs be permitted. Judge Bell sustained the request to supplement the record with the transcript but denied the request for additional briefing. Thus, in addition to the depositions cited by the parties, the undersigned has considered the evidence submitted at the preliminary injunction hearing as that evidence is reflected in the transcripts and exhibits.

Second, the respective motions, responses and replies were not all "filed" in a standard sequence because leave of court was necessary for some of the filings. Thus, the date of filing for each pleading, as reflected on the docket, is not consistent with the substantive sequence one would expect. Therefore, in an effort to assist a reviewing court, the substantive sequence of the relevant motions, responses, and replies is as follows:

1. "Motion for Summary Judgment on behalf of City of Cuyahoga Falls, Don Robart, in his official capacity, Gregg Wagner, and Gerald Dzurilla " (Docket No. 32). See also, "Exhibits in Support.

of Defendants' Motion for Summary Judgment" (Docket No.33).

2. "Motion for Summary Judgment by Defendant Robart in his Individual Capacity" (Docket No.34).

3. "Reply of Plaintiffs to Defendants' Motion for Summary Judgment" (Docket No. 50). See also Exhibits "A" through "K" (Docket No.40).

4. "Reply of Plaintiffs to Defendant Robart's Motion for Summary Judgment" (Docket No.49). See also Exhibits " A " through "K" (Docket No.40).

5. "Reply Brief of City of Cuyahoga Falls, Don Robart, in his official capacity, Gregg Wagner, and Gerald Dzurilla in Support of their Motion for Summary Judgment" (Docket No.51).

6. "Defendant Robart's Reply to Plaintiffs' Brief in Opposition to Motion for Summary Judgment" (Docket No.46).

With these two procedural items in mind and the background set forth above as context, the merits of the pending motions are addressed below.

III. Discussion.

Defendants, other than Mayor Robart in his individual capacity, moved for summary judgment on several grounds. See Docket No.32). Defendants argue that they are entitled to summary judgment on the basis of *res judicata*, judicial

immunity, failure to state a claim, lack of any discriminatory intent, and that the Fair Housing Act is unconstitutional as applied. Defendant Robart has also moved for summary judgment and asserts nearly the same arguments but also argues that at all times he acted in his official capacity.(See Docket No. 34). Plaintiffs have opposed each and every ground advanced in support of the motion for summary judgment.

As discussed in more detail below, because the *res judicata* claim raised by the Defendants other than Robart individually is largely dispositive of this case, it is not necessary to address every argument raised in the summary judgment motions. Thus, in Section A below, the *res judicata* issues are discussed first. In Section B, Plaintiffs' claims against Defendant Robart individually are addressed. Finally, in Section C, Fair Housing Contact Service's standing to assert the claims in this case is addressed.

A. Res judicata.

Initially, it is important to pause and clearly distinguish between the two primary types of *res judicata*: claim preclusion and issue preclusion. *In Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988), cert denied, 488 U.S. 1007 (1984), the Sixth Circuit Court of Appeals distinguished the types of *res judicata* by noting the United States Supreme Court's decision in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), stating:

> *Res judicata* is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion. " Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect is also

> referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of the determination that it should have advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

Barnes, 848 F.2d at 728, n. 5 (quoting *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1 (1984). The Sixth Circuit further commented that "[s]ome commentators and court decisions have used the term '*res judicata*' as being virtually synonymous with claim preclusion. " *Barnes*, 848 F.2d at 728, n. 5 (internal quotations omitted). Thus, "claim preclusion" is the equivalent of "*res judicata*"; "issue preclusion" is the equivalent of "collateral estoppel. " Claim preclusion is relevant to the inquiry here.

In *Barnes*, the Sixth Circuit explained that to determine the preclusive effect of a prior state judgment, a federal court must look to state law. The Sixth Circuit explained that "section 1738 of Title 28 of the United States Code requires that federal courts afford state court judgments both the issue and claim preclusive effects in subsequent actions under 42 U.S.C. 1983 that the state courts would afford them. 848 F.2d at 730 (citations omitted).

In *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995), the Ohio Supreme Court held: "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." 73 Ohio St. 3d at 379, syllabus by the court. In so holding, the Ohio Supreme Court expressly overruled paragraph two of the court's syllabus in *Norwood v. McDonald*, 142 Ohio

St. 299 (1943), previously the leading Ohio case on the issue of *res judicata*.

In *Grava*, the Ohio Supreme Court traced the court's prior holdings on the doctrine of *res judicata*. 73 Ohio St. 3d at 381-82. The Ohio Supreme Court explained that:

> With regard to the claim-preclusive effect of the doctrine of *res judicata*, this court, in previous years, has stated: "A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Norwood v. McDonald* (1943), 142 Ohio St. 299, 27 0.0. 240, 52 N.E. 2d 67, paragraph one of the syllabus; see, also, *Whitehead v. Gen. Tel. Co.*, [20 Ohio St. 2d 108 (1969)], paragraph one of the syllabus. We have also stated: "A judgment or decree in a former action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter." *Norwood*, *supra*, paragraph two of the syllabus; see, also, *Whitehead*, *supra*, paragraph two of the syllabus. To determine whether a second action was barred by this rule of law, one of the primary considerations was the identity of the evidence necessary to sustain each action. See *Norwood*, *supra*, paragraph four of the syllabus.

73 Ohio St. 3d at 381. The Ohio Supreme Court also explained "[i]n recent years, this court has not limited the application of the doctrine of *res judicata* to bar only those subsequent actions involving the same legal theory of

recovery as a previous action." 73 Ohio St. 3d at 382.

Finally, the Ohio Supreme Court held:

> [t]oday, we expressly adhere to the modem application of the doctrine of *res judicata*, as stated in 1 Restatement of the Law 2d, Judgments (1982), Sections 24-25, and hold that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. Therefore, we overrule the second paragraph of the syllabus in *Norwood*, *supra*, and overrule the second paragraph of the syllabus in Whitehead, supra, to the extent it is inconsistent with today's holding.

73 Ohio St. 3d at 382.

In *Shelar v. Shelar*, 910 F. Supp. 1307 (N.D. Ohio 1995), United States District Judge Carr reviewed and applied Grava. Judge Carr noted that "[p]reviously, *res judicata* did not always bar a subsequent action based upon a different legal theory." 910 F. Supp. at 1312, n. 3 (citation omitted). Judge Carr explained that:

> The Supreme Court of Ohio recently adopted "the modern application of the doctrine of *res judicata*, as stated in 1 Restatement of the Law 2d, *Judgments* (1982), Sections 24-25." *Grava v. Parkman Township*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). Consequently, "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Id.*
>
> In *Grava*, the plaintiff sought a zoning certificate for

> a nonconforming use. Earlier, he had unsuccessfully sought a certificate for the same planned building at the same site. He had asserted then, however, that he was entitled to a variance.
>
> The Ohio Supreme Court held that the judgment denying the first request precluded the second request. It was immaterial that *Grava* based the second request on a different "theory of substantive law." *Id.* at 383, 653 N.E.2d 226. A judgment, the court explained, bars later assertion of "all claims which...might have been litigated" in the initial action. *Id.* at 382, 653 N.E.ld 226 (*quoting National Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990". Hence a judgment precludes claims premised on a different legal basis, including claims that "would emphasize different elements or the facts." *Id.* 73 Ohio St.3d at 382-83, 653 N.E.2d 226 (*quoting* Restatement (Second) of Judgments, Section 24, comm. c at 200). A plaintiff must "present every ground for relief in the first action, or be forever barred from asserting it. " *Id.* at 382, 653 N.E.2d 226 (*quoting National Amusements*, 53 Ohio St.3d at 62, 558 N.E.2d 1178).

Shelar, 910 F. Supp. at 1311-12 (footnotes omitted) (italics in original).

In addition," [t]or the claim-preclusive aspect of *res judicata* to apply, the parties in a subsequent action must be identical to or in privity with the parties in the first action. " *Deaton v. Burney*, 107 Ohio App. 3d 407, 411 (1995).

The first task, therefore, is to determine whether the state suit filed May 1, 1996 in Summit County Common Pleas

Court concerns the same "transaction" as the suit filed in this court on July 5, 1996. As set forth below in subsection (i) the undersigned concludes that the two suits concern the same "transaction. " The next task is to identify the" identical parties " in the present suit, *i.e.*, the parties in this action who were also parties in the state court action, and those parties in privity with the identical parties. The latter two issues are addressed in subsections (ii) and (iii) below.

(i) "same transaction"

A "transaction" is defined as a "common nucleus of operative facts." *Grava*, 73 Ohio St. 3d at 382 (quoting Comment b to section 24 of the Restatement of Judgments). In *Grava*, the Ohio Supreme Court stated:

> Section 25 of the Restatement of Judgments, *supra*, at 209, further explains: "The rule of 24 applies to extinguish a claim by the plaintiff against the defendant *even though the plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action.*"

Grava, 73 Ohio St. 3d at 383 (italic in original).

In addressing this issue, the facts as alleged in the complaints must be examined. Plaintiffs' specific arguments as to whether this case involves the same transaction are also addressed.

(a.)

The complaint filed in this action and the complaint filed in the state action contain nearly identical factual allegations. The complaints differ from each other in only one material respect. The complaint in this action is based upon federal law, while the complaint in the earlier action was based on state law. The critical inquiry, however, is whether both complaints are based upon the same set of operative facts. To answer that question, both complaints must be compared.

A comparison of the federal complaint and the state complaint reveals a strong similarity between the factual allegations in the two complaints. In the federal complaint, the alleged chain of events leading to the complaint are set forth in the "Statement of Facts" portion of the complaint at paragraphs 12 through 31. (Docket No.1). In the state complaint, the corresponding factual allegations are set forth in paragraphs 6, and 11 through 24. (Docket No.33, Exhibit C). Paragraphs 12 through 20 and 23 through 27 of the federal complaint repeat the allegations set forth in paragraphs 6, and 11 through 24 of the state complaint, in some cases almost verbatim. The point is represented best by a "side-by-side" comparison. Such a comparison is set out in the Appendix to this Report and Recommendation.

Paragraphs 21, 22, and 28 through 31 of the federal complaint do not repeat factual allegations made in the state complaint. However, these non-repetitive paragraphs in the federal complaint do not alter the conclusion that the federal complaint and the state complaint concern a "common nucleus of operative facts."

In paragraph 21 of the federal complaint, Plaintiffs allege that "[t]he City Council passed Ordinance #48-1996 as an

emergency measure, to take effect immediately." While not stated as such in the state complaint, the substance of this allegation was set forth in the state complaint in paragraph 17 and Exhibit C to the complaint, *i.e.*, an attached copy of the April 1, 1996 ordinance. More importantly, however, the allegation in paragraph 21 of the federal complaint concerns an event which occurred prior to May 1, 1996, *i.e.*, the date the state complaint was filed, and was an event known to Plaintiffs at that time. Thus, the allegation does not concern a "new event," leaving aside the more important question whether it is outside the "nucleus of operative facts" with which the state complaint was concerned.

In paragraph 22 of the federal complaint, Plaintiffs allege:

> Article IX, Section 2 of the Cuyahoga Falls City Charter states that emergency ordinances and resolutions are eligible for referendum, "except that such emergency ordinances and resolutions shall go into effect at the time indicated therein."

(Docket No.1, para. 22). Again, this allegation relies upon information already in existence at the time the state complaint was filed and thus does not concern a new event.

In paragraph 28 of the federal complaint, Plaintiffs allege:

> The City Council failed to take any action within thirty days of receiving the returned petitions. Thus, pursuant to the City's municipal charter Article IX, the referendum was placed on the ballot for a vote of the electors of the City of Cuyahoga Falls in the November 1996 General Election by the Defendant Summit County Board of Elections.

(Docket No.1, para. 28). It is not disputed that the petition was returned to the Clerk of City Council on or about May 1, 1996, the date the state complaint was filed. It is disputed, however, whether City Council failed to take any action within the next thirty days. Compare, 28 of Plaintiffs federal complaint (Docket No.1), para. 2, Answer of Robart individually (Docket No.13), and para. 1, Answer of other Defendants (Docket No.15). That dispute concerns the period following May 1, 1996, and thus, in some sense, concerns a post May 1, 1996 event. However, plaintiffs in the state action were clearly aware of the prospect of the referendum being placed on the November, 1996 ballot, as they filed the May 1, 1996 complaint to prevent that very event from occurring. Paragraph 28 of the federal complaint therefore does not concern a different "nucleus of operative facts" than the state complaint.

In paragraph 29 of the federal complaint, Plaintiffs allege that, "[o]n or about April 5, 1996, Plaintiff Developers applied to the City for building permits necessary to commence construction pursuant to Ordinance #48-1996, " On its face, this allegation concerns an event which occurred prior to May 1, 1996 and is information that was known to the Plaintiffs at the time.

In paragraph 30 of the federal complaint, Plaintiffs allege that" [o]n information and belief, Defendant Mayor Robart, working through the city law department, informed Defendant Gerald Dzurilla that no permits for work authorized by Ordinance 48-1996 should be issued. " This allegation is in dispute. Plaintiffs do not, however, allege in paragraph 30 precisely when, allegedly, Mayor Robart told Dzurilla not to issue a building permit.

At the November 19, 1996 hearing before Judge Bell, however, Mr. Boone testified that Mayor Robart spoke out against the proposed apartment complex at the March 4, 1996 and March 18, 1996 council meetings and indicated that he would seek to delay the project. (Tr. at pp. 39-43). Mr. Boone attended both meetings. According to Mr. Boone, Mayor Robart indicated at the March 18, 1996 meeting that he would ask the City's law department to find a way to "turn us down legally." (Tr. at p. 43).

Mr. Boone further testified at the November 19, 1996 hearing that his company had received a building permit for a fence that the City required in connection with the project "sometime, I believe, in April," *i.e.*, April, 1996. (Tr. at pp. 47-48). Mr. Boone gave the following explanation as to why the fence was not built:

> Q: And have you built the fence?
>
> A: No, we have not.
>
> Q: Why haven't you built the fence?
>
> A: *Well. because it became pretty obvious that we are in a fight*, and I wasn't about to — first of all, we don't have the funds to put up a $70,000 fence. If we know we are going to receive with assurity the building permit to build the rest of the project, I — that's basically the reason.

(Tr. 48)(emphasis added). At his September 30, 1996 deposition, Mr. Boone testified that he believed he became entitled to a building permit on April 11, 1996. (Boone Dep. at p. 25).

The foregoing testimony leads to the conclusion that Mr. Boone knew prior to the filing of the state complaint on May 1, 1996 that Mayor Robart was against the proposed apartment complex, and that the building permit for the apartment complex was in jeopardy. Again, the allegation in paragraph 30 of the federal complaint is that, "[o]n information and belief, Defendant Mayor Robart, working through the city law department, informed Defendant Gerald Dzurilla that no permits for work authorized by Ordinance 48-1996 should be issued. " That the building permit was not forthcoming, however, was apparent to Mr. Boone in April, 1996, *i.e.*, prior to the filing of the state complaint. Paragraph 30 of the federal complaint thus does not concern an event outside the "nucleus of operative facts" which gave rise to the state complaint.

In paragraph 31 of the federal complaint, Plaintiffs allege that "[o]n or about June 26, 1996, Defendant Dzurilla sent a letter informing Plaintiff Developers that building permits would not issue due to the referendum petition." The record indicates that the June 26, 1996 letter was sent in response to a June 20, 1996 letter from P. Gilbertson Barno, Executive Director of Buckeye Community Hope Foundation. In the June 20, 1996, letter, Barno stated:

> On April 5, 1996, on behalf of Buckeye Community Three L.P., we submitted an application for a building permit for Pleasant Meadows Apartments, a 72-unit apartment development slated for construction on Pleasant Meadows Boulevard, Cuyahoga Falls. We have been advised that you are not processing this application because of a pending referendum vote which seeks to overturn the site plan approval which this project has received.

> Under the authority of *Gibson v. City of Oberlin*, 171 OS 1 (1960), Buckeye Community Hope Foundation, acting on behalf of Cuyahoga Housing Partners, Inc., General Partner of Buckeye Community Three L.P., under the terms of a closely-held corporation agreement, hereby makes demand that you forthwith issue the building permit referenced above or show just cause why the building permit should not be issued.
>
> Please reply to this correspondence promptly because of the severe time constraints under which the development must proceed. Thank you.

(Hearing Exhibit No.16). On June 26, 1996, Dzurilla responded:

> The Codified Ordinances of the City of Cuyahoga Falls prohibit me from issuing a building permit for a project that is not in compliance with the Zoning code. The site plan approval you claim to have received from City council is currently the subject of a referendum. By Charter, the ordinance granting that site plan approval does not take effect unless it is approved by the voters. It is my understanding that the Summit County Common Pleas court has ruled on the referendum issue, and upheld the Charter. Accordingly, there is no site plan approval as required in the Zoning code, and I am prohibited by law from issuing a building permit.

(Hearing Exhibit No.15).

Mr. Dzurilla's June 26, 1996 letter does not fall outside the "common nucleus of operative facts" which gave rise to

the state complaint, *i.e.*, the issuance of the building permit for the apartment complex. On the contrary, the June 26, 1996 letter concerns precisely that matter. Moreover, the June 26, 1996 letter was prompted by Mr. Barno's June 20, 1996 letter. That letter, in turn, apparently represents a "demand letter" foreshadowing the filing of the federal complaint on July 5, 1996. The June 26, 1996 letter, and the June 20, 1996 letter that prompted it, merely represent another step in the effort to obtain the building permit — an effort which began prior to May 1, 1996.

In sum, as set forth above, paragraphs 12 through 20 and 23 through 27 of the federal complaint repeat the allegations set forth in paragraphs 6, and 11 through 24 of the state complaint. Further, while paragraphs 21, 22, and 28 through 31 of the federal complaint do not repeat allegations made in the state complaint, they also do not alter the conclusion that the federal complaint and state complaint concern a "common nucleus of operative facts," *i.e.*, the facts surrounding the issuance of the building permit for the apartment complex.

The leading Ohio case on principles of *res judicata*, *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995), involved an analogous situation. In deciding that two applications for a zoning certificate involved one "transaction," the Ohio Supreme Court stated:

> We hold that Grava's second application for a zoning certificate is barred by the doctrine of *res judicata*. Grava's second application is based on a claim arising from a nucleus of facts that was the subject matter of his first application. *In both instances, Grava was attempting to construct exactly the same building on the same tract of land*, which had fewer acres than

> Section 404.4 of the local zoning ordinance required. *In fact, the only difference between the two applications is the theory of substantive law under which Grava sought relief.*

73 Ohio St. 3d at 383 (italic in original) (emphasis added).

The present case likewise involves two attempts to construct the same building on the same tract of land. In the first attempt, the plaintiffs filed suit on May 1, 1996 in Summit County Common Pleas Court. The second attempt is the case presently before the court. The only real difference between the state and federal suits is the substantive theories of law under which relief is being sought. The earlier action was based upon Ohio law, while in the present case, Plaintiffs ground their claims in federal law.[13]

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[13] Plaintiffs cite *Truax v. EM Industries. Inc.*, 107 Ohio App. 3d 210 (1995) and *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925 (7th Cir. 1988), cert. denied 489 U.S. 1081 (1989), in support of the proposition that this case involves more than one "transaction." Both cases are distinguishable, however. In *Truax*, the issue was the preclusive effect in state court of an arbitrator's ruling, under a collective bargaining agreement, which denied a worker's grievance that she had been wrongfully discharged for filing a fraudulent workers. compensation claim. The state appellate court concluded that the worker could claim in state court that the retaliatory discharge violated Ohio Revised Code 4123.90, but the court's analysis relied heavily upon a line of cases arising in the context of collective bargaining agreements. Plaintiffs have not demonstrated why a similar rationale is applicable in this case. While *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925 (7th Cir. 1988), like this case, involved the proposed use of a parcel of land, there was, as Defendants argue, a lengthy history in that case involving several clearly distinct

(b.)

In an effort to show that this action involves a different transaction than that which was at issue in the state action, Plaintiffs argue that:

> [i]n the Summit County action, the Plaintiffs alleged solely that a referendum on the ordinance approving the site plan of Plaintiff Developers would be contrary to the Ohio constitution, which does not provide for a referendum of an administrative act. The Plaintiffs did not allege that Defendants were infringing their rights by not issuing the building permits, as at that time they were still involved in negotiations over some of the conditions the City supposedly required prior to the issuance of those permits. Nor did the Plaintiffs in the state court action aliege any discriminatory motive behind or impact that would result from the referendum. They could not have done so as that was not knowledge possessed by the Plaintiffs at that time.

(Docket No.50, p. 9) (footnote omitted). The last sentence of the quote as set forth above is fleshed out further in Plaintiffs' Brief at pages seven and eight. Plaintiffs claim that "[a]t the time of the filing of the Summit County Common Pleas action, Plaintiffs did not know that the City had made a decision that it would not proceed to continue processing the building permits for the project." (Docket No.50, p. 7). Plaintiffs also claim that they did not "have knowledge of the extent of the Mayor's involvement in the campaign to attain

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transactions. This case, in contrast, involves just one transaction, *i.e.*, the common nucleus of operative facts surrounding the issuance of building permits for the Pleasant Meadow apartment complex.

a referendum or of his decision to order that no building permits be issued, a decision that may have predated the filing of the referendum petitions. There is also evidence that other City officials, such as Councilman Potts, actively campaigned to stop the project. It is these actions that form the factual basis for the claims in this suit. " (Docket No.50, p. 8) (footnote omitted).

Thus, Plaintiffs argue that the second case does not involve the same transaction because: (1) the prior action did not involve the violations of their rights as a result of Defendants' denial of the building permit; and (2) they were not aware of certain events as of May 1, 1996. The two primary claims are addressed below.

1.

The claim that Plaintiffs "did not allege that Defendants were infringing their rights by not issuing building permits," in the state action is contradicted both by the relief sought in the state complaint and the evidence in the record before this court.

Paragraph five in the claim for relief in of the state complaint explicitly refers to the building permits:

> [t]hat the Court declare that if the Defendant, City Council, acted in its administrative capacity in adopting and passing Ordinance 48-1996 on 1 April 1996, *that then the Plaintiffs are able to proceed and should not be hindered in obtaining the necessary building permit(s) in an effort to promptly commence in the construction of Plaintiffs' 72 unit apartment complex*; and

(Docket No.33, Exhibit C) (emphasis added).

Plaintiffs also claim that "in the state court action [they did not] allege any discriminatory motive behind or impact that would result from the referendum." The allegation of motive is relevant to the substantive legal theories which were relied upon in the state action, and those which are relied upon in the present action. Under Ohio law, however, "[t]hat a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims." *Grava*, 73 Ohio St. 3d at 382 (quoting Comment c to Section 24, 1 Restatement of Judgments 2d (1982" (internal quotations omitted).

Moreover, "[t]he doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Grava*, 73 Ohio St. at 382 (quoting *National Amusements*, 53 Ohio St. 3d 60, 62 (1990))(internal quotations omitted). More importantly, there is evidence in the record that Mr. Boone was aware of his rights under federal law well in advance of filing the state action and felt that those rights had been violated prior to the filing of that action. In particular, Mr. Boone admitted that he raised the Fair Housing Act at the March 18, 1996 meeting. (Tr. at p. 60).

> Q: Isn't it true that the reason you raised that act. is because you wanted City Council to approve your project?
>
> A: Yes, I — based upon what I heard at the prior meetings, I felt that the reason if we were going to be denied was based upon hate and prejudice and discrimination and I wanted to basically let city council know that I wasn't going to tolerate it.

Q: Do you believe that the referendum petition that was filed on April 29th, 1996 was a result of hate and prejudice?

A: Yes.

(Tr. at p. 60-61). In his deposition, Mr. Boone suggested that he did not understand that the Fair Housing Act was a federal law. (Boone Dep. at pp. 12-13). This after-the-fact statement is undermined by the extent of his statement at the March 18, 1996 meeting. (See Hearing Exhibit 24, pp. 2-3). Mr. Boone stated:

> [t]he fair housing act 42-UA-3601 states that it is a violation of the federal fair housing act for any person including a municipality, to make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin. In addition to that Ohio Revised Code Section 4112:02(H)(1) states that it is unlawful and a discriminatory practice for any person to deny or make unavailable housing because of race, color, religion, sex, ancestry, handicapped, national origin or familial status.
>
> In summary, we feel we have the legal right to proceed, and we are at this time requesting to council to not delay our efforts any longer. We understand the tremendous pressure the community has brought to bear upon you as elected officials. However, please remember the voters that placed you in this position of trust, places you in that position to do what is legally right for the community, not what happens to be popular. Thank you very much.

(Hearing Exhibit 24, p. 3). Furthermore, Mr. Boone testified at the hearing before Judge Bell that Mr. Kramer, *i.e.*, Mr. Boone's counsel in the state action and this action, attended the March 18, 1996 meeting. (Tr. at p. 40).

Because Mr. Boone, and the entities he controls, chose initially to pursue relief in state court, they should have alleged *all* of their claims, including their federal claims, in that forum.[14] Instead, Plaintiffs decided to take "the simplest, quickest route available to them." (Docket No.50, p. 9). Plaintiffs chose their forum and this court should defer to the

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[14] Alternatively, the plaintiffs could have filed suit in federal court initially. For example, in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), the United States Supreme Court stated:

> In the present litigation, petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court.

465 U.S. at 84-85 (footnote omitted). The Supreme Court further stated:

> In the event that a 1983 plaintiffs federal and state-law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state-law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, *e.g.*, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

465 U.S. at 85 n.7 (italics in original).

finality of the Ohio judgment. *Migra v. Warren City School District Board of Education*, 465 U.5. 75 (1984).

2.

Plaintiffs also claim that they were not aware of certain events at the time of the May 1, 1996 state complaint. As noted above, they claim, for example, that they did not know that the City would not proceed to continue processing the building permit. This claim is not supported by the record.

Mr. Boone testified that he understood that the building of the fence was a condition which had to be met before the building permit for the apartment complex would issue. (Tr. at pp. 90-91). After City Council approved the site plan, Plaintiffs applied for the permit within days. (Tr. at p. 44). Mr. Boone testified, however, that work on the fence did not begin "because it became pretty obvious that we are in a fight, and I wasn't about to — first of all, we don't have the funds to put up a $70,000 fence. If we know we are going to receive with assurity the building permit to build the rest of the project, I — that's basically the reason. " (Tr. at p. 48). He also testified that he did not proceed with building the fence because "the rumors of a referendum were very prevalent." (Tr. at p. 92). He testified, "I felt the reasonable thing to do was to delay the construction of the fence until I was assured we were going to get a building permit." (Tr. at p. 92) (emphasis added).

The record before this court is clear. Mr. Boone was, according to his own testimony, aware that the issuance of the building permit for the complex was, at best, in jeopardy, and at worst, a foregone conclusion. His actions speak the loudest — he decided not to build the fence until he was "assured" that he was going to get the building permit. Paragraph five

of the prayer for relief in the state action sought just that, *i.e.*, that plaintiffs "not be hindered in obtaining the necessary building permit(s) in an effort to promptly commence in the construction of Plaintiffs' 72 unit apartment complex[.]" (Docket No.33, Exhibit C).

Plaintiffs have pointed to no evidence in the record which would demonstrate a triable issue on this point. Instead, Plaintiffs argue that "as late as April 26, 1996 the Chief Building Officer for Cuyahoga Falls was communicating by letter with requests for necessary changes to Plaintiff Developers in order to issue, building permits. Plaintiffs were not officially notified that Defendants would not issue the building permits until receiving...the Dzurilla [June 26, 1996] letter." (Docket No.50, p. 7) (footnote omitted). The April 26, 1996 communication was identified as Hearing Exhibit 17. This written communication merely represents the City's response to the plans after review by the various departments. There is no indication in that communication about the issuance of the permit for the building. Even so, there is no testimony in the record which would support any claim by Mr. Boone that he relied on this communication and believed that the permit was forthcoming. Again, his own testimony supports the contrary conclusion.[15]

Plaintiffs also claim that they were not aware of actions taken by certain administrators at the time of the May 1, 1996 state action. Again, the record provides no support for this assertion. At his deposition, Mr. Boone was asked why he

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[15] Counsel's statement that Plaintiffs were not "officially notified" until June 26, 1996 suggests that there was "unofficial" notice.

made the reference to the Fair Housing Act on March 18, 1996 and he stated:

> A: Because I — I felt and still feel that the reason that we were having so much trouble is because of discrimination.
>
> Q: On whose part?
>
> A: On the City's part. On the people that live in the City. *And certain members of the Administration.*

(Boone Dep. at p. 16) (emphasis added).

Further, Plaintiffs fail to cite any evidence of when they learned of such actions giving rise to the claims against the City administrators. As set forth above, there are no new material facts alleged in the complaint which was filed some sixty-five days after the first complaint. One would assume that if such new facts were discovered after the May 1, 1996 complaint, such facts would be alleged in the second action.

Finally, Mr. Boone testified that he believed, as of March 18, 1996, that the referendum was "based on discrimination. I believe that the reason they're doing it is based upon hate and prejudice...." (Boone Dep. at pp. 19-20).

> Q: Has anything happened between March 18 and today, being September 30, [1996,] to cause you to change your belief?
>
> A: *Not really. I'd say it's just been confirmed more, to be honest.*

(Boone Dep. at p. 20) (emphasis added).

(c.)

In summary, the action filed in Summit County Common Pleas Court on May 1, 1996, and the federal action presently before this court involve the same "transaction" for purposes of Ohio law and *res judicata* analysis.

(ii) "identical parties"

As set forth above, " [t]or the claim-preclusive aspect of *res judicata* to apply, the parties in a subsequent action must be identical to or in privity with the parties in the first action." *Deaton v. Burney*, 107 Ohio App. 3d 407, 411 (1995) (emphasis added) (italics in original).

The state complaint, as noted above, names as plaintiffs:

(1) Buckeye Community Hope Foundation;
(2) Cuyahoga Housing Partners, Inc.; and
(3) Buckeye Community Three L.P.

(Docket No.33, Exhibit C). The federal complaint names as plaintiffs:

(1) Buckeye Community Hope Foundation;
(2) Cuyahoga Housing Partners, Inc.;
(3) Buckeye Community Three L.P.;
(4) Fair Housing Contact Service.

(Docket No.1). Thus, on the plaintiff side, the "identical parties" in the state and federal suits are:

(1) Buckeye Community Hope Foundation;
(2) Cuyahoga Housing Partners, Inc.; and
(3) Buckeye Community Three L.P.

The state complaint named as defendants:

(1) City of Cuyahoga Falls;
(2) Cuyahoga Falls City Council;
(3) Gregg Wagner, Clerk of City Council, City of Cuyahoga Falls; and
(4) Summit County Board of Elections.

The federal complaint names as defendants:

(1) City of Cuyahoga Falls;
(2) Don Robart, in his individual and official capacity as Mayor, City of Cuyahoga Falls;
(3) Gregg Wagner, in his official capacity as Clerk of City Council, City of Cuyahoga Falls;
(4) Summit County Board of Elections; and
(5) Gerald M. Dzurilla, in his official capacity as Chief City Engineer.

On the defendant side, the "identical parties" are:

(1) the City of Cuyahoga Falls;
(2) Gregg Wagner, in his official capacity as Clerk of City Council; and
(3) the Summit County Board of Elections.

Therefore, the claims of Buckeye Community Foundation, Cuyahoga Partners, and Buckeye Three Limited, the state plaintiffs, against the City of Cuyahoga Falls, Gregg Wagner, in his official capacity as Clerk of City Council, and the Summit County Board of Elections, are, as a matter of law, are barred on grounds of *res judicata*. *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995); *Deaton v. Burney*, 107 Ohio App. 3d 407 (1995).

(iii) "privity"

As set forth above, the "identical parties" to this suit should be dismissed on grounds of *res judicata* in light of the suit filed in Summit County Common Pleas Court. The next step in the inquiry is to determine which of the remaining parties are "in privity" to the identical parties. Those in privity should also be dismissed on grounds of *res judicata*. The remaining parties on the defendant side are: (1) Don Robart, in his official capacity as Mayor of Cuyahoga Falls, (2) Don Robart, in his individual capacity, and (3) Gerald Dzurilla, in his official capacity as Chief City Engineer. On the plaintiff side, the remaining party is Fair Housing Contact Service.

Under Ohio law, privity does not require a strict identity of parties:

> Although the doctrine of *res judicata* generally requires an identity of parties, strict identity is not always required. The doctrine has been applied when the party in the subsequent action, though not named as a party in the prior action, was a real party in interest in that prior action. In applying the doctrine, the court will look beyond the nominal parties to the substance of the cause to determine the real party in interest. Identity of parties is not a mere matter of form, but of substance.

Deaton v. Burney, 107 Ohio App. 3d 407, 412 (1995) (citations omitted). In *Kentucky v. Graham*, 473 U.S. 159 (1985), the United States Supreme Court stated:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he

> takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity It is not a suit against the official personally, for the real party in interest is the entity.

473 U.S. at 165-66 (italics in original) (citations omitted). The undersigned therefore concludes that Mr. Robart, in his official capacity as Mayor of Cuyahoga Falls, and Gerald Dzurilla, in his official capacity as Chief City Engineer, are in privity with the City of Cuyahoga Falls and should be dismissed from this action.

With regard to Mr. Robart individually, the weight of authority appears to support the proposition that a government official sued in his individual capacity is not in privity with the government entity for purposes of *res judicata*. See, *e.g.*, *Conner v. Reinhard*, 847 F.2d 384, 395 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988) ("courts do not generally consider an official sued in his personal capacity as being in privity with the government."). At least one district court has stated, however, that, "[a]lthough an official sued in his individual capacity is generally not considered to be in privity with the government, and consequently not bound by a prior adjudication in which the government was a party,...a party cannot escape the rule of *res judicata through expansive pleadings*." *Cohen v. Shea*, 788 F. Supp. 66, 68 (D.Mass. 1992) (italics in original) (citations omitted) (emphasis added). Giving Plaintiffs the benefit of the doubt on this point, the undersigned concludes that Mr. Robart, in his individual

capacity, is not in privity with the City of Cuyahoga Falls. As set forth below, however, summary judgment in his favor is appropriate because Plaintiffs have failed to show that he acted in his individual capacity at any time in connection with the events giving rise to this lawsuit.

Defendants also assert that Fair Housing Contact Service is in privity with Plaintiff Developers, but cite no legal authority to support this specific proposition. (Docket No.51, p. 9). The undersigned concludes that Fair Housing Contact Service is not in privity with Plaintiff Developers for *res judicata* purposes. As set forth in Section C below, however, Fair Housing Contact Service lacks standing and should be dismissed.

B. Mr. Robart, individually.

The claims against Mayor Robart in his official capacity have been discussed above, and for the reasons stated, the claims are barred. The claims asserted against him in his individual capacity must now be addressed. While Plaintiffs have asserted several causes of action against Mr. Robart in his individual capacity, the critical initial inquiry is, however, whether the record reflects any actions by him in his individual capacity. A review of the record reflects that there is no evidence that Mr. Robart acted in any other capacity than as Mayor of Cuyahoga Falls. On this basis alone, Defendant Robart is entitled to summary judgment.

* * *

At his deposition, Mr. Boone testified that he "believes" that Mayor Robart was the person who facilitated the entire referendum process. (Boone Dep. at pp. 33-34). Yet, Mr. Boone admitted that he is not aware of any statements made

by any persons that would lead him to believe that Mayor Robart was the "force" behind the referendum. (Boone Dep. at p. 35). Mr. Boone testified that Mayor Robart did not tell him that he started referendum process. (Boone Dep. at p. 91). According to Mr. Boone, no one told Mr. Boone that Mayor Robart started the referendum process. (*Id.*) Mr. Boone also stated that he was not aware of any documents which reflect that Mayor Robart started the referendum process. (Boone Dep. at pp. 91-92). Further, Mr. Boone answered, "[n]o one" to the question: "Who told you or gave you information that led you to believe that Mayor Robart, either in his official capacity as Mayor or in his individual capacity as a citizen, started or initiated the [r]eferendum process: (Boone Dep. at pp. 93-94; *see also* pp. 94-95).

Mr. Boone's testimony at the preliminary injunction hearing before Judge Bell was similar. The most telling comment by Mr. Boone was as follows:

> Q . . . . Did [Mayor Robart] ever tell you he was opposing this project because children were involved?
>
> A. Specifically, he just said he was opposing the project because of the outcry of the constituents. So my opinion is that if he's opposing it because of their opposing it because of children or African Americans, then he is too.
>
> Q. Guilt by association?
>
> A. Yeah, more or less. (Tr. at pp. 106).

* * *

Plaintiffs argue that Mayor Robart's motivation for "lending support" for the referendum was exposed by his statements made at council meetings. (*See* Docket No.49, p. 4) In support, Plaintiffs argue that Mr. Robart did "not deny stating that Plaintiffs' project should be opposed 'with vigor,' in front of a number of the residents who led the petition drive to put the referendum on the ballot." (Docket No.49, p. 3) (footnote omitted). This statement, however, was made to the community as a whole at the March 18, 1996, meeting and not a special meeting of the citizen group promoting the referendum as Plaintiffs' brief suggests. Indeed, Plaintiffs point to Mayor Robart's statement at the March 18, 1996, as an important piece of evidence demonstrating the Mayor's discriminatory motive. (Docket No. 49, pp. 3-5). In particular, Plaintiffs claim that his statement on March 18, 1996 reflects that "Mayor Robart anticipated the possibility of lawsuit as a result of his actions." (Docket No. 49, p. 5).

Mayor Robart's statement at the March 18, 1996 statement is set forth in Hearing Exhibit 24 at pages 12 through 14. A review of the statement and Mayor Robart's corresponding hearing and deposition testimony reveals that Mayor Robart did take a strong position in opposition to the development. In fact, his position was that City Council reject the site plan. It is also clear that when Mayor Robart discussed the possibility of legal action he was discussing it in the context of what might happen if City Council rejected the site plan. Mayor Robart stated: "We are saying, well if we oppose this, if we vote it down, which I recommend all council do, then Mr. Boone is going to sue." (Hearing Exhibit 24, p. 13). It is clear that Mayor Robart was not anticipating a lawsuit for his own personal conduct. Later in the same statement, Mayor Robart concedes that if the proposal was

voted down and Mr. Boone sues, he will win. Apparently, Mayor Robart recognized what has been conceded in this case, that there was no legal justification for rejecting the site plan. Council recognized as much when it rejected Mayor Robart's suggestion to vote down the plan and passed the ordinance at its next meeting.

Plaintiffs also point to the fact that Mayor Robart called Mr. Barno after the decision by Judge Murphy to "gloat." (Docket No.49, pp. 6-7). Mr. Barno testified at the November, 1996 hearing that Mayor Robart called him after Judge Murphy's decision and asked if Mr. Barno had heard about the Judge's decision. According to Mr. Barno, Mayor Robart said "he wasn't calling to gloat but that he just thought we might like to know, ha, ha." (Tr. at p. 391). While the conduct is not what one would expect of a mayor, such a statement in the face of the evidence in the record is not enough to establish that Mayor Robart was acting in anything other than his official capacity.

* * *

In sum, Plaintiffs have failed to identify any evidence in the record which would create an issue as to whether Mr. Robart acted in any capacity other than his official capacity.

C. Fair Housing Contact Service — standing.

At this stage of the analysis, one Plaintiff remains: Fair Housing Contact Service. On this record, the undersigned concludes that Fair Housing Contact Service lacks standing.

Standing is a jurisdictional requirement and may be raised by a federal court *sua sponte*. "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the

jurisdictional] doctrines.'" *FW/PBS. Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (bracketed language in original) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984). The Sixth Circuit explained that: "Standing is determined by applying a three-part test: (1) has the plaintiff suffered a direct or imminent injury in fact? (2) is there a causal connection between the injury and defendant's conduct, or was the injury caused by 'the independent action of some third party not before the court?' and (3) is there a 'likelihood that the injury will be redressed by a favorable decision?'" *DeBolt v. Espy*, 47 F.3d 777, 779 (6th Cir. 1995) (citation omitted) (Fair Housing Act case). An organization may have independent standing to sue, apart from its members, but:

> [a] mere interest in a problem is not . . . sufficient to confer standing upon an organization. Instead, . . . the Coalition must establish "that its ability to further its goals has been 'perceptively impaired' so as to constitute[] far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982).

Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 716-17 (6th Cir. 1995) (italics in original) (citation omitted). An organization may also have standing to sue in a representative capacity, provided it can show that "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Greater Cincinnati Coalition for the Homeless*, 56 F.3d at 717 (quoting *Hunt v. Washington State Apple Advertising*

Commission, 432 U.S. 333, 343 (1977".

(i) "evidence in the record"

On the record before the court, there is no evidence, beyond one conclusory allegation in the complaint, and a corresponding affidavit, of Fair Housing Contact Service's involvement in the proposed development, that would establish standing on the part of Fair Housing Contact Service. The little evidence in the record is as follows.

In Plaintiffs' complaint, there is only one specific reference to Fair Housing Contact Service. In paragraph eight of the complaint, which is included in the "Parties" section of the complaint, alleges:

> Plaintiff Fair Housing Contact Service is a not-for-profit, fair housing organization located in Akron, Ohio. Fair Housing Contact Service has had a contract with Summit County since 1974 to provide fair housing services, landlord-tenant counseling, housing research, and technical assistance. Fair Housing Contact Service is required to provide for fair housing activities throughout the county. Part of this agreement states that as a recipient of funding, Fair Housing Contact Service will "administer all programs and activities relating to housing and community development in a manner to affirmatively further fair housing within Constitutional limitations throughout the United States. " Some of its employees and members are potential tenants for the apartment complex to be built by the Developers at the Pleasant Meadow Blvd[.] property. The actions and conduct of the defendants are frustrating the fair housing purpose of the organization, its employees and members.

(Docket No. I at para. 8). The "Statement of Facts" section of the complaint makes no reference whatsoever to Fair Housing Contact Service. Instead, the facts involve Plaintiff Developers. Similarly, in the "Claims for Relief" section of the complaint, there is no allegation of an injury specific to Fair Housing Contact Service. Again, the claims refer to "Plaintiff Developer," "Plaintiff Foundation," or "Plaintiffs" collectively.

The record also contains an October 29, 1996 affidavit of Lynn M. Clark, Executive Director Fair Housing Contact Service. (Docket No.50, Exhibit L). In pertinent part, the affidavit states:

> FHCS has been damaged by the Defendants in case No. 5:96CV1458 because its mission has been thwarted and its resources expended to combat the discrimination in housing that FHCS believes occurred as described in the pleadings in that matter.
>
> FHCS employees and individual [*sic*] members who subscribe to our services will be harmed by the Defendants in case No. 5:96CV1458 because they are perspective [*sic*] eligible residents for this housing which would enable them to save monies and not be forced to expend excess funds on obtaining safe and decent housing. Preventing the development of this housing will cause FHCS employees and members permanent and irreversible harm by denying them an [*sic*] choice of affordable, safe and decent housing located in the neighborhood of their preference.

(Docket No.50, Exhibit L).

On Tuesday, November 19, 1996, at the injunction

hearing before Judge Bell, Plaintiffs presented the testimony of two persons who identified themselves as members of Fair Housing Contact Service, Sandra Montgomery and Crystal M. Williams. (Tr. at pp. 158-69). Ms. Montgomery testified that she had been a member of Fair Housing Contact Service for about four years. (Tr. at p. 159). In response to the question, "[i]f you could rent a two or three bedroom apartment in Cuyahoga Falls on Pleasant Meadow Boulevard and your child could attend the Woodridge schools at a below market rent, below fair market rent value, would you apply to rent at that apartment building?", Ms. Montgomery testified, "[y]es, I would." (Tr. at p. 159).

On cross-examination, however, Ms. Montgomery testified that she became a member of Fair Housing Contact Service simply by calling its office, that she did not have to pay any dues, and that she does not receive any newsletters. (Tr. at pp. 159-60). She described her contact with Fair Housing Contact Service since becoming a member as "not a lot." (Tr. at p. 160). Ms. Montgomery further testified that her first contact with anyone regarding the case was the previous Saturday, when she spoke with Lynn Clark and volunteered to testify. (Tr. at pp. 162-63).

Crystal Williams also testified that she would apply to rent a two or three bedroom apartment, at below market rent, on Pleasant Meadow Boulevard in Cuyahoga Falls. (Tr. at p. 166). Ms. Williams, a student at the University of Akron, testified that if she had a subsidized apartment, she would probably attend graduate school. (Tr. at 166-67).

(ii) "standing analysis"

It is apparent that Fair Housing Contact Service has patterned its allegation of injury upon the plaintiff organization's allegation of relief in *Havens RealtY Co. v. Coleman*, 455 U.S. 363 (1982). In paragraph eight of the complaint, Fair Housing Contact Service alleges that "[t]he actions and conduct of the defendants are frustrating the fair housing [purpose] of the organization, its employees and members." Ms. Clark's affidavit further indicates that FHCS has been damaged by the Defendants in case No.5:96CV1458 because its mission has been thwarted and its resources expended to combat the discrimination in housing that FHCS believes occurred as described in the pleadings in that matter. " In *Havens Realty*, the plaintiff organization Housing Opportunities Made Equal ("HOME") alleged that:

> "Plaintiff HOME has been *frustrated* by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to *devote significant resources* to identify and counteract the defendant's [*sic*] racially discriminatory steering practices."

455 U.S. at 79 (quotation marks and "sic" in original) (emphasis added). Invoking the *Havens Realty* language, however, does not by itself guarantee a finding of standing.

In *Williams v Adams*, 625 F. Supp. 256 (N.D. Ill. 1985), the plaintiff, Hope Fair Housing Center, evidently modeled its allegation of injury on *Havens Realty*. The district court granted the defendants' motion to dismiss. Hope alleged in the complaint that the defendants' conduct conflicted with the organization's goals. 625 F. Supp. at 259. The district court

rejected this argument:

> With respect to claims of standing in its own behalf, it is not enough that an organization allege that a particular defendant's conduct is against the policies or goals of that organization. It is precisely this type of broad organizational interest which the Supreme Court rejected in *Sierra Club v. Morton*, 405 U.S. 727, 739-40, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972), since it is too abstract to represent a meaningful basis for standing. If this type of interest were all that is necessary to establish standing, Hope would have standing in every individual case of alleged housing discrimination in DuPage County, or perhaps in an even broader geographical area.

625 F. Supp. at 260 (italics in original). The district court characterized the central issue in the following manner: "[t]he problem here is that nowhere in the complaint has Hope articulated how it or any of its members have been banned by the defendants ' actions. " 625 F. Supp. at 261; also *Greater Cincinnati Coalition for the Homeless*, 56 F.3d at 717 (affirming district court's dismissal of complaint and noting district court's statement that "'[t]he Coalition has not demonstrated any distinct and palpable increase in its expenditures as a result of the Ordinance.'").

In this case, the basic issue is the same. In paragraph eight of the complaint, Fair Housing Contact Service makes a generalized allegation of harm based on frustration of purpose. As noted above, any mention of Fair Housing Contact Service, independent of the other Plaintiffs, is conspicuously absent from the remainder of the complaint. Since filing the complaint, Fair Housing Contact Service has

submitted the affidavit of Ms. Clark and, as set forth above, presented the testimony of two witnesses at the injunction hearing. This additional "evidence," however, does not add in any meaningful way to Fair Housing Contact Service's conclusory allegation in the complaint that it and its members have been harmed. In the summary judgment context, Fair Housing Contact Service is required to come forward with "specific facts" to support its allegations with regard to standing. *See* Fed. R. Civ. P. 56(e). Fair Housing Contact Service has failed to meet this requirement. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) ("Rule 56(e) provides that judgment 'shall be entered' against the nonmoving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' *The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.*") (emphasis added).

As a final point, Fair Housing Contact Service's claim that it has expended additional resources as a result of Defendants' actions is undercut by Mr. Boone's testimony at his deposition that Fair Housing Contact Service is not paying its own legal fees in the present litigation. (Boone Dep. at p. 57). Further, while a court is under no obligation to "comb" the record in an effort to find evidence which demonstrates a factual dispute, the undersigned has reviewed this record and notes the complete absence of Fair Housing Contact Service at every juncture, except for the present litigation. Mr. Boone's testimony regarding how he learned that Fair Housing Contact Service was to be a plaintiff is revealing; the record strongly suggests he was told by his lawyer that the organization would be a plaintiff. (Boone Dep. at pp. 52-54).

Fair Housing Contact Service points to no specific facts in

the record, and none are apparent upon the undersigned's independent review of the record, to support its conclusory allegations with regard to standing. For the reasons set forth above, Fair Housing Contact Service should be dismissed from the case because it lacks standing.

IV. Conclusion.

For the reasons set forth above, the Defendants' motions for summary judgment (Docket Nos. 32 and 34) should be granted and this case should be dismissed in its entirety.[16]

As a final matter, it is important to note that the recommended decision embodied here does not represent any judgment on the Defendants' actions on the merits or the referendum. The record clearly conveys the emotional nature of the issues raised by the proposed development. The undersigned, however, has evaluated the legal issues presented in this case detached from the emotion reflected in the record.

Plaintiffs controlled their own destiny when they chose the time and forum for the first action. They were sophisticated in these matters, fully aware of their rights, and had the benefit of legal counsel. They simply chose, in Plaintiffs' own words, to take "the simplest, quickest route available[.]"

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of

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[16] Defendant Summit County Board of Elections has not specifically moved for summary judgment. Nonetheless, judgment should be entered in its favor and against the Plaintiffs for the reasons applicable to the City Defendants.

service of a copy hereof as provided in 28 U. S.C. 636(b)(1) and Local Rule 5:3.1(b)[17] Failure to file objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Pursuant to Local Rule 5:3.1(b), objections, if any, to this Report and Recommendation shall be filed with the Clerk of Court and served on the United States Magistrate Judge and all parties. Any response to such objections shall be filed and served in a similar manner.

SIGNED and ENTERED on this 14th day of February, 1997.

s/ James D. Thomas
United States Magistrate Judge

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[17] The undersigned's courtroom deputy has arranged for personal service of this report and recommendation to be completed on February 14, 1997. Given the background of this case, the undersigned suggests that any objections should be filed forthwith.

Appendix

state complaint	federal complaint
6 That the foundation caused the formation of said BCTLP and Cuyahoga entities controlled by it, specifically for the development of the premises noted *infra*, and following the usual practice necessary for the eventual funding of the development utilizing "tax credits" and "grants" from The Ohio Department of Development for a HOME Loan, Summit County, Ohio for a HOME Loan, and the Summit County Housing Trust Fund.	12 Plaintiff Foundation caused the formation of Plaintiffs BCTLP and Cuyahoga ... specifically for the development of the property located at the south side of Pleasant Meadow Blvd., Cuyahoga Falls. The Developer followed the usual practice necessary for the eventual funding of a development using "tax credits" and "grants" by applying with the Ohio Department of Development for a HOME Loan, Summit County, Ohio for a HOME Loan, and the Summit County Housing Trust Fund.
12 That the real property noted in Exhibit "B" was zoned R-17 Medium Density Multiple Family, prior to the aforementioned purchase date, and continues to be zoned R-17, and during the period of purchase to present	14 The Pleasant Meadow Blvd was zoned R-17 Medium Density Multiple Family, prior to the purchase date, and continues to be zoned R-17, and during the period of purchase to present is not

is not known to be the subject of any proposed change of zoning[.]	known to be the subject of any proposed change of zoning.
13 That prior to 21 February 1996, the Foundation, submitted a proper and complete site plan proposal for a 72 unit apartment complex for the aforementioned real property to the Planning Commission for the City, known as Planning Commission File P-6-96-SP.	15 Prior to February 21, 1996, Plaintiff Foundation submitted a proper and complete site plan proposal for a 72-unit apartment complex for the property to the Planning Commission for the City, known as Planning Commission File P-6-96-SP, which plan met or exceeded all construction and developmental ordinances, regulations, laws and codes for the land in question.
14 That the Foundation did not request the Planning Commission for any zoning amendments, variances, or any other change of the current and proper R-17 Medium Density Multiple Family zoning of the premises, which meet and exceeded all construction and developmental ordinances and regulations[.]	16 Plaintiff Foundation did not request from the Planning Commission any zoning amendments, variances, or any other change of the current and proper R-17 Medium Density Multiple Family zoning of the premises.
15 That on or about 21	17 On or about February

February 1996, the Planning Commission unanimously approved Plaintiff, Foundations, site plan proposal, without condition (excepting those accepted by Plaintiff, Foundation)[.]	21, 1996, the Planning Commission unanimously approved Plaintiff Foundation's site plan proposal.
16 That on or about 1 April 1996, the aforementioned site plan proposal was submitted to Defendant, City Council, for approval, per the City's charter, Article VIII, Section 1.7[.]	18 Prior to April 1, 1996, the site plan proposal was submitted to Defendant City Council for approval according to the City's Charter, Article VIII, Section 1.7.
17 That the Defendant, City Council, approved the Planning Commission's recommendation in Ordinance #48-1996, by a vote of six to three and two abstentions, acting in its administrative capacity. No zoning amendments, variances, or other charges [sic] were made to the site plan proposal adopted by the Planning Commission ...	19 On April 1, 1996, Defendant City Council, acting in its administrative capacity, approved the Planning Commission's recommendation in Ordinance #48-1996, by a vote of six to three and two abstentions. 20 No zoning amendments, variances, or other changes were made by Ordinance #48-1996 to the site plan proposal adopted by the Planning Commission.

18 That the Mayor of the City of Cuyahoga Falls did not sign nor return to Defendant, City Council, Ordinance 48-1996, pursuant to Article 2, Section 5 of the City's charter; whereby said Ordinance went into full force and effect ten days from the date Defendant, City Council's, passage of said Ordinance on 1 April 1996, having an effective date of 11 April 1996[.]	23 The Mayor of the City of Cuyahoga Falls did not sign nor return to Defendant, City Council, Ordinance #48-1996; whereby, pursuant to Article 2, Section 5 of the City's charter; the Ordinance went into full force and effect on April 11, 1996, ten days from the date of Defendant City Council's passage of this Ordinance.
19 That on or about 29 April 1996, certain purported electors of the City of Cuyahoga Falls submitted to Defendant, Gregg Wagner, in his capacity as the Clerk of City Council, a referendum petition in an effort to overturn the aforementioned Ordinance 48-1996.	24 On or about April 29, 1996, certain purported electors of the City of Cuyahoga Falls, who had opposed the Developers' site plan before the Planning Commission and City Council because the project would be targeted for families with children and because they feared the apartment complex would attract minorities, submitted to Defendant Gregg Wager, in his capacity as the Clerk for City Council, a referendum petition in an effort to repeal Ordinance

#48-1996.

20 That on or about 30 April 1996, Defendant Gregg Wagner, after accepting said petition from certain purported electors, authorized said petition in his capacity as Clerk for City Council and has or will submit said petition to Defendant , Summit County Board of Elections, for verification and certification of the signatures affixed to said petition[.]

21That Defendant, Summit County Board of Elections, is now or will soon be in the process of verifying and certifying the signatures affixed to said petition[.]

22 That should Defendant, Summit County Board of Elections, be allowed to verify and certify the signatures affixed to said petition, Defendant, Summit County Board of Elections, would then submit said petition to Defendant, City

25 On or about April 30, 1996, Defendant Gregg Wagner, after accepting these petitions from certain purported electors, authorized in his capacity as Clerk for City Council the submission of the petition to Defendant Summit county Board of Elections for verification and certification of the signatures affixed to the petition.

26 Defendant Summit County Board of Elections verified and certified the signatures affixed to the petition to be sufficient to submit this issue for a vote of the electors of the City of Cuyahoga Falls in the November 1996 General Election.

27 On or about May 1, 1996, the Defendant, Summit County Board of Elections then returned the petitions to the Defendant

Council , pursuant to Defendant, City's, municipal charter Article IX[.]

Gregg Wagner for further action by City Council pursuant to Defendant City's municipal charter Article IX.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Filed December 4, 2001

Nos. 99-4555/00-3052

Buckeye Community Hope Foundation, et al.,)
Plaintiffs-Appellants/Cross-Appellees)
)
v.)
)
City Of Cuyahoga Falls, et al.,)
Defendants-Appellees/Cross-Appellants)

ORDER

BEFORE: JONES, DAUGHTREY, and COLE, Circuit Judges,

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

APPENDIX F

SUPREME COURT OF OHIO

No. 97-137

BUCKEYE COMMUNITY HOPE FOUNDATION et al.,
Appellants,

vs.

CITY OF CUYAHOGA FALLS et al.,
Appellees.

82 Ohio St.3d 539, 697 N.E.2d 181, 1998 Ohio LEXIS 2198
July 16, 1998, Decided

Original Opinion of May 6, 1998, Reported at: 1998 Ohio LEXIS 1204.

STATEMENT OF THE CASE

APPEAL from the Court of Appeals for Summit County, No. 17933.

ON MOTION FOR RECONSIDERATION

Appellant Buckeye Community Hope Foundation ("Buckeye Hope"), a nonprofit Ohio corporation, develops housing for individuals through the use of state grants and tax

credits. Buckeye Hope is affiliated with Cuyahoga Housing Partners, Inc. and Buckeye Community Three L.P. ("Buckeye Three"), also appellants herein.

In 1995, Buckeye Three purchased a tract of land in Cuyahoga Falls for the purpose of building a seventy-two unit apartment complex. The land was zoned for multifamily use. Subsequently, the Cuyahoga Falls Planning Commission unanimously approved a site plan concerning the proposed complex. Pursuant to Section 1.7, Article VIII of the Charter of Cuyahoga Falls, the plan was then submitted to the City Council of Cuyahoga Falls for its approval.

On April 1, 1996, the city council ratified the decision of the planning commission by passing Ordinance No. 48-1996. The ordinance provided, in part, that "City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission * * * ."

Following passage of the ordinance, a group of residents of Cuyahoga Falls filed referendum petitions with the clerk of city council. The petitions sought a referendum to approve or reject Ordinance No. 48-1996, pursuant to Section 2, Article IX of the municipal charter, which provides, in relevant part, that the citizens of Cuyahoga Falls "have the power to approve or reject at the polls *any ordinance or resolution passed by the Council* * * * ." (Emphasis added.) The Summit County Board of Elections then certified that the petitions contained a sufficient number of valid signatures to be placed on the November 1996 ballot.

On May 1, 1996, the appellants filed a complaint against the appellees in the Court of Common Pleas of Summit County, requesting injunctive relief and a declaration that the ordinance could not be challenged by referendum because its passage by the city council was an administrative, rather than legislative, action. Appellants claimed that Section 1f, Article II of the Ohio Constitution did not grant powers of referendum to citizens of municipalities on administrative actions taken by municipal legislative bodies.

The trial court denied the appellants' request for injunctive relief. The court also determined that the Charter of Cuyahoga Falls permitted the residents of the city to exercise powers of referendum on any action taken by the city council, regardless of whether the action taken was legislative or administrative in nature.

Appellants appealed the decision of the trial court to the Court of Appeals for Summit County. The court of appeals affirmed the judgment of the trial court, holding that Section 1f, Article II of the Ohio Constitution does not limit the referendum powers of charter municipalities such as Cuyahoga Falls.

Pursuant to the allowance of a discretionary appeal, this court affirmed the judgment of the court of appeals. *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 692 N.E.2d 997.

The cause is now before this court upon a motion for reconsideration filed by the appellants.

HEADNOTE

Municipal corporations -- Citizens of municipality may not

exercise powers of referendum greater than those powers granted by Section 1f, Article II of the Ohio Constitution -- Pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body that constitute administrative action are not subject to referendum proceedings -- Passage by city council of an ordinance approving a site plan for the development of land constitutes administrative action and is not subject to referendum proceedings.

SYLLABUS

1. The citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

2. Pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to referendum proceedings.

3. The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations, constitutes administrative action and is not subject to referendum proceedings.

COUNSEL

Zeiger & Carpenter, John W. Zeiger, Jeffrey A. Lipps and Michael N. Beekhuizen; McFarland Law Office and J. Drew McFarland, for appellants.

JUDGES

MOYER, C.J. PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur. LUNDBERG STRATTON, J., concurs separately. DOUGLAS, RESNICK and F.E. SWEENEY, JJ., dissent.

AUTHOR: MOYER

OPINION

{*541}

MOYER, C.J. This court has invoked the reconsideration procedures set forth in S. Ct.Prac.R. XI to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, 383, 662 N.E.2d 339, 341. For the reasons that follow, we grant the appellants' motion for reconsideration and reverse the judgment of the court of appeals.

I

Section 3, Article XVIII of the Ohio Constitution grants powers of local self-government to municipalities by providing, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." In exercising those powers, municipalities may choose to govern themselves by charter in accordance with Section 7, Article XVIII of the Ohio Constitution: "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

It is well settled that although the Ohio Constitution grants broad powers of local self-government to municipalities, the scope of those powers is not without limits. In *Canton v. Whitman* (1975), 44 Ohio St.2d 62, 73 Ohio Op. 2d 285, 337 N.E.2d 766, this court interpreted Section 3, Article XVIII as follows: "This section, adopted in 1912, preserved the supremacy of the state in matters of 'police, sanitary and other similar regulations,' while granting municipalities sovereignty in matters of local self-government, *limited only by other constitutional provisions.*" (Emphasis added.) *Id.* at 65, 73 Ohio Op. 2d at 287, 337 N.E.2d at 769. See, also, *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 20, 577 N.E.2d 645, 647.

In *Bazell v. Cincinnati* (1968), 13 Ohio St.2d 63, 42 Ohio Op. 2d 137, 233 N.E.2d 864, paragraph one of the syllabus, we articulated the limits of charter government by stating that "a charter city has all powers of local self-government *except to the {*542} extent that those powers are taken from it or limited by other provisions of the Constitution* or by statutory limitations on the powers of the municipality which the Constitution has authorized the General Assembly to impose." (Emphasis added.) More recently, we stated that "[a] municipality that chooses to adopt a charter does so in order to manage its own purely local affairs without interference from the state, *with the understanding that these local laws will not conflict with the Constitution and general laws.*" (Emphasis added.) *Rispo Realty & Dev. Co. v. Parma* (1990), 55 Ohio St.3d 101, 102, 564 N.E.2d 425, 426-427.

The City Charter of Cuyahoga Falls provides that voters may exercise powers of referendum on any ordinance or resolution passed by the city council. The appellants contend

that this provision conflicts with Section 1f, Article II of the Constitution, which provides, "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers may be exercised in the manner now or hereafter provided by law."

Words used in the Constitution are construed according to their usual or customary meaning. See *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995, 998; R.C. 1.42. Section 1f, Article II reserves referendum powers to the people of "each municipality." Those words are unambiguous. There is no distinction between charter municipalities and municipalities that have no charter. Additionally, Section 1f, Article II is the sole constitutional source of initiative and referendum powers, reserved by the people of the state to the people of each municipality.

Section 1f, Article II provides initiative and referendum powers only on those questions that municipalities "may now or hereafter be authorized by law to control by legislative action." We have interpreted this phrase to exclude, from referendum proceedings, administrative actions taken by a city council.[1] In *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 56 Ohio Op. 2d 6, 271 N.E.2d 864, we held that "under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which

[1] As a municipal legislative body, city councils may act in an administrative capacity. *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 Ohio Op. 2d 1, 233 N.E.2d 500, paragraph one of the syllabus.

municipalities are 'authorized by law to control by legislative action.'" *Myers* at paragraph one of the syllabus. There, we determined that the passage of a resolution "granting a permit for the operation of a sanitary landfill, pursuant to an existing zoning regulation, constitutes administrative action and is not subject to referendum proceedings." *Id.* at paragraph two of the syllabus. See, also, *State ex rel. Srovnal v. Linton* (1976), 46 Ohio St.2d 207, 75 Ohio Op. 2d 241, 346 N.E.2d 764.

{*543} The prior majority opinion in this case determined that both *Myers* and *Srovnal* were inapposite because neither case presented an issue regarding referendum powers granted by charter. That conclusion was not correct.

The prior majority opinion reasoned that because Section 1f, Article II is not a self-executing provision, charter municipalities enacting ancillary legislation to carry out the principles enunciated in Section 1f, Article II were not restricted to following the statutory initiative and referendum procedures enacted by the General Assembly for non-charter municipalities. *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St.3d 559, 565-566, 692 N.E.2d 997, 1001-1002 (1998). The prior majority opinion then concluded that by virtue of Section 7, Article XVIII, charter municipalities were not limited by Section 1f, Article II to providing referendum powers only for actions legislative in nature. *Buckeye*, 81 Ohio St.3d at 566, 692 N.E.2d at 1002.

It is true that charter municipalities, in providing for referendum and initiative powers, are not restricted to the statutory mechanisms for initiative and referendum proceedings that govern non-charter municipalities. Charter provisions may be more restrictive, or less restrictive than those statutory procedures pursuant to the power of local self-

government granted by the people under Sections 3 and 7 of Article XVIII, as the prior majority opinion noted. *Buckeye*, 81 Ohio St.3d at 565-566, 692 N.E.2d at 1001-1002. However, both the statutory procedures enacted by the General Assembly to carry into effect Section 1f, Article II, and provisions enacted by charter municipalities to do the same, must be consistent with the specific powers granted by Section 1f, Article II, since it is the sole constitutional source for referendum and initiative powers. Otherwise, the meaning of any constitutional provision that is not self-executing, and therefore requires ancillary legislation, could be altered by the words of the legislation carrying the provision into effect.

Accordingly, there is no persuasive reason to deviate from our well-established case law as stated in *Myers* and *Srovnal*. Section 1f, Article II clearly limits referendum and initiative powers to questions that are legislative in nature. Charter municipalities are subject to this limitation, as the powers of local self-government granted pursuant to Sections 3 and 7 of Article XVIII are subject to the limitations of other provisions of the Constitution. See *Bazell*, at paragraph one of the syllabus, and *Whitman*, 44 Ohio St.2d at 65, 73 Ohio Op. 2d at 287, 337 N.E.2d at 769.

The section of the Charter of Cuyahoga Falls providing that voters may exercise powers of referendum on any ordinance or resolution passed by the city council is constitutionally invalid. Voters of Cuyahoga Falls may exercise powers of referendum on any ordinance or resolution that constitutes legislative action. Section 1f, Article II does not authorize the residents of Cuyahoga Falls to initiate referendum proceedings on an action taken by the city council that is not {*544} legislative in nature. Section 1f, Article II

permits initiative and referendum powers only on those matters that constitute legislative action.

Therefore, we hold that the citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

II

The remaining question for our determination is whether the approval of the site plan by the city council constituted administrative or legislative action.

The city argued that the approval of the site plan was a legislative action because the action was taken by adopting an ordinance. In support of its position, the city cited *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 Ohio Op. 2d 1, 233 N.E.2d 500, paragraph two of the syllabus, which states that "the test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence."

The question presented to this court in *Donnelly* was whether the action of a city council in failing to approve the recommendation of the city's planning commission for a resubdivision of a parcel of real estate constituted legislative or administrative action. *Id.* at 3, 42 Ohio Op. 2d at 2, 233 N.E.2d at 501. This court determined that the action was administrative. Id. at 4, 42 Ohio Op. 2d at 3, 233 N.E.2d at 502. In arriving at that conclusion, the court stated, " 'The crucial test for determining that which is legislative from that which is administrative or executive is whether the action

taken was one already making a law, or executing or administering a law already in existence.' * * * If, then, the action of a legislative body *creates a law, that action is legislative, but if the action of that body consists of executing an existing law, the action is administrative.*" (Emphasis added.) *Id.* at 4, 42 Ohio Op. 2d at 2-3, 233 N.E.2d at 502, citing *Kelley v. John* (1956), 162 Neb. 319, 321, 75 N.W.2d 713, 715. Therefore, paragraph two of the syllabus in *Donnelly* established that the test requires an examination of the nature of the action taken, rather than the mere form in which it is taken.[2] Accordingly, the city's position that the approval of the site plan was a legislative action because the council took action via an ordinance (rather than by resolution or other means) is in error.

Additionally, the city argued that the ordinance approving the site plan constituted legislative action because city law stated that decisions made by the {*545} city council relating to approvals of site plans "shall be considered as legislative rather than administrative actions." Cuyahoga Falls Zoning Ordinance No. 1171.03(c). This argument also is without merit. The city council cannot designate an action as legislative simply because it desires the action to be legislative. *Donnelly* requires that the nature of the action taken determines whether it is legislative or administrative, *i.e.*, whether the action creates or establishes law, or whether the action merely applies existing law to a given situation. *Donnelly* at 4, 42 Ohio Op. 2d at 2, 233 N.E.2d at 502. Additionally, it is our constitutional duty, in interpreting the

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[2] The quoted language in the text of *Donnelly* is instructive in determining the meaning of paragraph two of the syllabus because paragraph two itself is not stated within the text.

words of Section 1f, Article II, to independently analyze whether the action by the city is a legislative action.

The action taken by the city council here was clearly administrative in nature. Ordinance No. 48-1996 passed by the city council approved a plan for the "development of land * * * in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission * * * ." The ordinance merely approves the planning commission's application of existing zoning regulations to the plan submitted by the appellants. The ordinance has no general, prospective application such that the action taken would fit within the usual and customary meaning of the phrase "legislative action" contained in Section 1f, Article II. See Black's Law Dictionary (6 Ed.1990) 899 (defining "legislative act" as "law * * * passed by legislature in contrast to court-made law. One which prescribes what the law shall be in future cases arising under its provisions."). Rather, the city council determined the rights of the appellants by applying existing law to the site plan submitted by the appellants. Accordingly, adoption of Ordinance No. 48-1996 was an administrative act, and therefore was not a legislative action that could be subjected to referendum proceedings pursuant to Section 1f, Article II.

Therefore, we hold that pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to referendum proceedings. The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations,

constitutes administrative action and is not subject to referendum proceedings.

Pursuant to S. Ct. Prac. R. XI, the timely filing of a motion for reconsideration temporarily prevents the issuance of a mandate in accordance with the court's judgment. A timely motion was filed in this cause. Thus, this court has not yet issued a mandate in this action to implement our opinion rendered on May 6, 1998, and reported at 81 Ohio St.3d 559, 692 N.E.2d 997. Under S. Ct.Prac.R. XI(3)(A)(2), where a timely filed motion for reconsideration is granted, a mandate shall issue at the time the Supreme Court's judgment entry on reconsideration is {*546} entered. In accordance with our grant of the motion for reconsideration today, a mandate implementing this opinion shall also issue today.

For the foregoing reasons, we grant the motion for reconsideration and reverse the judgment of the court of appeals.[3]

Reconsideration granted and judgment reversed.

PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.
LUNDBERG STRATTON, J., concurs separately.
DOUGLAS, RESNICK and F.E. SWEENEY, JJ., dissent.

DISPOSITION

Reconsideration granted and judgment reversed.

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[3] Our earlier opinion, including paragraphs one and two of the syllabus, as reported at 81 Ohio St.3d 559, 692 N.E.2d 997, is hereby nullified in all respects by virtue of our decision today, and thus has no controlling authority.

CONCURRENCE

LUNDBERG STRATTON, J., concurring. As the justice who changed her vote on an opinion that has already been published, I feel obliged to explain my decision to reconsider and to join the former dissenters in issuing a new majority opinion.

As a trial judge, issues before me were frequently clear, easy to resolve, and more black and white (though certainly not always). However, when a case reaches the Supreme Court, the black and white issues have often been resolved by settlement, fallen by the wayside, or have been resolved by the lower courts by established precedent, case law, or statute. More frequently, the issues we accept for full consideration upon the allowance of a discretionary appeal are now gray -- what did the drafters of the United States or the Ohio Constitutions mean by this broad language we must apply to this narrow fact pattern or to this twentieth century technology issue? What did the legislature intend by this confusing statute? Did the legislature even think that the statute would ever be applied as the parties now contend it should be? Who is right -- the three very experienced appellate court districts who believe this new law is constitutional or the four other equally learned and respected appellate districts who strongly disagree? Does the court or the General Assembly decide public policy? What if public policy is overriding the constitutional rights of a minority? These are tough issues we struggle with daily, seeking that correct interpretation, that fine balancing of rights. I constantly challenge myself as to whether this is the "right" decision or whether I have reached it because my own judicial philosophy colors my outlook. Am I being an activist or deferring too much to the legislature?

There are no simple answers.

{*547} Into this difficult mix comes *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St.3d 559, 692 N.E.2d 997 (1998) -- that all-too-complex clash between two groups -- the developer seeking to move forward on an unpopular but worthy project opposed by the homeowners who do not want that project "in their backyard." Both sides have valid, strong legal and emotional arguments; both firmly believe in their cause; both look to us to finally resolve the conflict.

I voted with the majority in *Buckeye Community Hope Found. v. City of Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 692 N.E.2d 997, because I passionately believe in the rights of the voter. It is the cornerstone of our system of justice.

I grew up in three foreign countries as a daughter of American missionaries. I was born in Thailand and attended boarding schools in South Viet Nam and Malaysia. I saw countries governed by military dictators, by monarchs, by anarchy, and by communists. I came from the outside to this country, where the right to vote, though not always exercised, is one of its most cherished foundations, the basis of its representative form of government. The openness of our government, and the power of our vote to determine who represents us in our government, cannot be fully appreciated until one has lived in countries that do not have those privileges.

Therefore, when I considered the first majority opinion, it seemed the right decision. The people should have the ultimate right to decide their own fate, to be the final arbiters of their community's course. The majority's argument was

powerful that Home Rule allowed a chartered municipality to grant its voters the final say. That is the strength of our system.

But I forgot in my zeal to affirm the power of the vote that our forefathers carefully fashioned some checks and balances that are equally a cornerstone to our system. Our system of three equal branches, which balance and check each other, does not exist in many other countries, where the legislature or the courts are merely puppets of the executive branch. Yet, to allow any of the three branches to become more powerful than the other two is to create instability in our system. Underlying the three branches is the right to vote, sometimes direct and sometimes representative. The crafters of our Constitution recognized that sometimes our representatives need some distance from the voting so that they can make a decision that may not be popular at the moment, but may be best or right in the long haul. Thus, state representatives have close accountability with two-year terms, senators are more insulated by four-year terms, and the judiciary by six-year terms -- still accountable but with greater freedom to act as necessary though it may not be popular.

But predictability and stability are also important to the survival of our system. A mere change of our President cannot wipe out decades of law and statutes, as happens in many countries. The legislature acts as the check against the {*548} arbitrary changes of the administrative branch; the courts as a check against both. Homeowners must be secure in the knowledge that their deed to their home will survive the election; businesses must be able to rely on the stability of contracts, zoning laws, tax laws, and laws governing relationships, whether their business is to build factories or to

operate a beauty salon. The loss of stability can result in chaos.

In reconsidering *Buckeye Community Hope Found.*, and in weighing all of those heavy thoughts and constitutional issues, about which volumes have been written, I now join the new majority because I believe it has arrived at the right analysis; I now believe my former view was wrong. I see now that the framers of the Ohio Constitution had a good reason for Section 1f, Article II, in limiting the referendum to legislative decisions only. But to apply the referendum to everyday administrative decisions, even if the charter of the municipality so allows (and I am no longer convinced this is what the drafters of the charter intended), is to submit the minutiae of everyday administrative decision-making to the whim of the voter at the moment. The unpopular development, the disfavored contract with a school principal, the neighbor's new garage approval, or any other decision could be subject to voter disapproval if an angered voter was organized or well-funded enough. Chaos and instability could result. The decisions made by homeowners, developers, schools, or anyone else could no longer depend on established zoning approvals or contracts made -- all could be thrown out at whim.

The law of unintended consequences is "the idea that whenever society takes action to change something, there will be unanticipated or unintended effects." Fortune, Aug., 1996. Sometimes legislative action results in unintentional consequences. Sometimes our actions do also. We make a decision that seems right, constitutional, and just at the time, but cannot always foresee how it can apply in ways we never intended. I now see the danger of my original vote and the

wisdom of the original framers of our Constitution in limiting referendums to legislative actions and in not allowing municipalities to exercise powers greater than the Constitution grants. In this case, Section 1f, Article II trumps the Home Rule Amendment. I believe this is what the Constitution intends. I now so vote accordingly.

DISSENT

DOUGLAS, J., dissenting. I dissent from the judgment and opinion of the majority. Subsequent to our May 6, 1998 decision in *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 692 N.E.2d 997, appellants filed a motion for reconsideration. However, in granting appellants' motion, the majority has clearly disregarded the requirements of S. Ct.Prac.R. XI. Section 2 {*549} of S. Ct.Prac.R. XI provides that a motion for reconsideration shall be confined strictly to the grounds urged for reconsideration and that the motion "shall not constitute a reargument of the case." Appellants' motion is premised upon essentially the same arguments that were initially presented to this court. In fact, the motion contains absolutely nothing that warrants a change from our original decision. The majority, however, in rehearing the cause for whatever undisclosed reasons, has conveniently ignored the requirements of S. Ct.Prac.R. XI. Oh well, so much for the rules!

In any event, I also dissent from the judgment and the opinion of the majority because I cannot agree with the majority's severe restriction of the sacrosanct right of referendum. What is particularly disturbing is that the majority completely ignores the clear wording of the drafters of Section 1f, Article II and turns the *enabling* provision into an affirmative limitation on the right of referendum. I

continue to believe that our original decision in *Buckeye* is correct, is supported by law, and, most importantly, reflects the fundamental precepts upon which our state and country are based. In that regard it is interesting to recall, during this time of the year, July 4, when we celebrate the founding of our country and our Declaration of Independence, that that sacred document contains the words "that to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed.*" (Emphasis added.) Today, the majority tells the citizens of Cuyahoga Falls, and all other communities and citizens likely situated, that what they have voted into their charters means nothing because if the charter provision in question here can be negated by the waving of the four-vote magic wand, then no charter provision is truly sacred. So much for "just powers" being derived "from the consent of the governed." Given today's holding, Section 2, Article I of the Ohio Constitution should now read that "all political power is [no longer] inherent in the people."

Finally, this case is *not* about missionaries, separation of powers, length of terms of office, the President, or a "disfavored contract with a school principal." This case *is* about Home Rule Charters voted into existence by electors in municipalities all across this state having nothing to do, of course, with the parade of horribles assembled in the concurring opinion. The citizens of a municipality have the authority to establish the means and methods to govern their own affairs.

Accordingly, I dissent. I would deny the motion for reconsideration and follow our decision reported in 81 Ohio St.3d 559, 692 N.E.2d 997, which affirmed the well-reasoned

judgment of the court of appeals.

RESNICK and F.E. SWEENEY, JJ., concur in the foregoing dissenting opinion.

APPENDIX G

SUPREME COURT OF OHIO

No. 97-137
81 Ohio St.3d 559, 692 N.E.2d 997, 1998 Ohio LEXIS 1204

[Filed May 6, 1998]

BUCKEYE COMMUNITY HOPE FOUNDATION ET AL., *APPELLANTS*,

vs.

CITY OF CUYAHOGA FALLS ET AL., *APPELLEES*.

APPEAL from the Court of Appeals for Summit County, No. 17933.

STATEMENT OF THE CASE

The facts giving rise to this appeal are not in dispute. Appellant Buckeye Community Hope Foundation ("Buckeye Hope") is a nonprofit corporation that develops housing for individuals through the use of low-income housing tax credits. Buckeye Hope is affiliated with Cuyahoga Housing Partners, Inc. and Buckeye Community Three L.P. ("Buckeye Three"), also appellants herein.

On June 12, 1995, Buckeye Three purchased a parcel of land located within the appellee city of Cuyahoga Falls. Appellants intended to construct a seventy-two-unit apartment complex on the parcel. At the time of purchase, the land was zoned for multifamily use. A site plan regarding the proposed development was submitted to the Cuyahoga Falls Planning Commission, which, on February 21, 1996, recommended that the project be approved. Thereafter, in accordance with the Cuyahoga Falls City Charter, the site plan was then submitted to the appellee Cuyahoga Falls City Council for its approval.

On April 1, 1996, city council accepted the recommendation of the planning commission and passed Ordinance No. 48-1996. In Section 1 of the ordinance, council stated, "That this City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-96-SP.".

Subsequently, referendum petitions were filed with the appellee Cuyahoga Falls Clerk of Council challenging the passage of the ordinance. The petitions were then forwarded to the appellee Summit County Board of Elections. The board of elections determined that the petitions contained a sufficient number of valid signatures.

In an attempt to keep the referendum off the November 1996 ballot, appellants, on May 1, 1996, filed a complaint against appellees in the Court of Common Pleas of Summit County. Appellants sought to enjoin appellees from taking any

further action regarding the referendum process. Appellants also requested a judicial determination that, because the passage of the ordinance constituted merely administrative as opposed to legislative action by council, the ordinance was not subject to challenge by way of referendum. Appellants claimed that Section 1f, Article II of the Ohio Constitution prohibited a referendum on actions taken by a municipal legislative body that were administrative in nature.

The trial court conducted a hearing with respect to appellants' request for injunctive relief. On May 31, 1996, the court ruled in favor of appellees, denying appellants' request for a preliminary or permanent injunction. The court held that the classification of action taken by council in passing Ordinance No. 48-1996, whether administrative or legislative in character, was not dispositive of whether the ordinance could be submitted to a vote of the electors. Rather, the court determined that the ordinance could be voted on because the citizens of Cuyahoga Falls had specifically reserved to themselves such a right under their charter.

Appellants appealed the trial court's decision to the Court of Appeals for Summit County. On December 18, 1996, the court of appeals affirmed the judgment of the trial court.

The cause is now before this court upon the allowance of a discretionary appeal.

HEADNOTE

Municipal corporations--Sections 3 and 7, Article XVIII of the Ohio Constitution confer upon municipalities the authority "to exercise all powers of local self-government"--People of municipality may, by charter, reserve to themselves the power to approve, or reject, by popular vote, any actions of city council.

SYLLABUS

1. Sections 3 and 7, Article XVIII of the Ohio Constitution confer upon municipalities the authority "to exercise all powers of local self-government." Section 1f, Article II of the Ohio Constitution does not limit that authority.

2. In accordance with Section 3 and 7, Article XVIII of the Ohio Constitution, the people of a municipality may, by charter, reserve to themselves the power to approve or reject, by popular vote, any actions of city council regardless of whether such actions are administrative or legislative in nature.

COUNSEL

Zeiger & Carpenter, John W. Zeiger, Jeffrey A. Lipps and Michael N. Beekhuizen; McFarland Law Office and J. Drew McFarland, for appellants.

Virgil Arrington, Jr., Cuyahoga Falls Deputy Law Director, for appellees city of Cuyahoga Falls, Cuyahoga Falls City Council, and Cuyahoga Falls Clerk of Council.

Maureen O'Connor, Summit County Prosecuting Attorney, and William E. Schultz, Assistant Prosecuting Attorney, for appellee Summit County Board of Elections.

Malcolm C. Douglas, urging affirmance for amicus curiae, South Solon Homeowners Association, Inc.

Roger Gupta, pro se, urging affirmance for amicus curiae, Dr. Roger Gupta, Emeritus Professor, Kent State University.

Walter & Haverfield P.L.L., Charles T. Riehl and Fredrick W. Whatley, urging reversal for amicus curiae, Cuyahoga County Law Directors Association.

Fair Housing Law Clinic, Edward G. Kramer, Diane E. Citrino and Kathy J. Grey; Porter, Wright, Morris & Arthur and Robert D. Anderle, urging reversal for amicus curiae, Coalition on Homelessness and Housing in Ohio.

JUDGES

DOUGLAS, J. RESNICK, F.E. SWEENEY and LUNDBERG STRATTON, JJ., concur. MOYER, C.J., PFEIFER and COOK, JJ., dissent.

AUTHOR: DOUGLAS

OPINION

{*562} DOUGLAS, J. The trial court and court of appeals determined that the citizens of Cuyahoga Falls were entitled, by virtue of their city charter, to vote on the passage of Ordinance No. 48-1996. We agree. Accordingly, we affirm the judgment of the court of appeals.

Cuyahoga Falls, as a charter municipality, derives its sovereign power from Article XVIII of the Ohio Constitution. Before 1912, the time of the adoption of Article XVIII, municipalities could exercise only those powers delegated to them by the General Assembly. *Geauga Cty. Bd. of Commrs. v. Munn Rd. Sand & Gravel* (1993), 67 Ohio St.3d 579, 582,

621 N.E.2d 696, 699. With the adoption of Article XVIII, municipalities were given the power to control matters of local concern. In *Perrysburg v. Ridgway* (1923), 108 Ohio St. 245, 255, 140 N.E. 595, 598, the court discussed the underpinnings for the adoption of Article XVIII, and stated:

> "Prior to 1912 there was no express delegation of power to municipalities in the Ohio Constitution. Under the decisions of our courts, it had been held again and again * * * that municipal power was delegated only by virtue of a statute. Therefore, municipalities of the state, especially the larger ones, were continually at the door of Ohio's General Assembly asking for additional political power for municipalities, or modifications in some form of previous delegations of such power. Such power, being legislative only, could be withdrawn from the municipalities, or amended, at any session of the Legislature.
>
> "Municipalities were, therefore, largely a political football for each succeeding Legislature, and there was neither stability of law, touching municipal power, nor sufficient elasticity of law to meet changed and changing municipal conditions. To the sovereign people of Ohio the municipalities appealed in the constitutional convention of 1912, and the Eighteenth Amendment, then known as the 'Home Rule' Amendment, was for the first time adopted as part of the Constitution of Ohio, *wherein the sovereign people of the state expressly delegated to the sovereign people of the municipalities of the state full and complete political power in all matters of 'local self-*

government.'" (Emphasis added and citation omitted.)

{*563} Further, Section 7, Article XVIII "confers power on the municipality to frame and adopt a charter for its government, and to *exercise thereunder* all powers of local self-government as provided by section 3. That is, the people of the municipality are given the power to construct the machinery of their own local government and to operate it themselves." (Emphasis *sic.*) *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 390-391, 124 N.E. 212, 216. See, also, *State ex rel. Hackley v. Edmonds* (1948), 150 Ohio St. 203, 212, 37 Ohio Op. 474, 477, 80 N.E.2d 769, 773 ("It would seem from reading the debates that the Constitutional Convention desired to submit to the electorate of this state amendments to the Constitution to give to municipalities, and particularly to those which adopt charters, the broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide nature or interest."). The words "as are not in conflict with general laws," found in Section 3, Article XVIII, apply only to a city's power to adopt "local police, sanitary and other similar regulations," but not its power to enact laws for "local self-government." See *Rispo Realty & Dev. Co. v. Parma* (1990), 55 Ohio St.3d 101, 103, 564 N.E.2d 425, 427, citing *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 5 Ohio Op. 2d 481, 151 N.E.2d 722, paragraph four of the syllabus. See, also, *Dies Elec. Co. v. Akron* (1980), 62 Ohio St.2d 322, 325, 16 Ohio Op. 3d 365, 367, 405 N.E.2d 1026, 1028. Additionally, "by reason of Sections 3 and 7 of Article XVIII of the Ohio Constitution, a charter city has all powers of local self-government except to the extent that those powers are taken from it or limited by other provisions of the Constitution or by statutory limitations on the powers of the

municipality which the Constitution has authorized the General Assembly to impose." *Bazell v. Cincinnati* (1968), 13 Ohio St.2d 63, 42 Ohio Op. 2d 137, 233 N.E.2d 864, paragraph one of the syllabus.

Pursuant to Section 7, Article XVIII of the Ohio Constitution, the people of Cuyahoga Falls enacted a charter to govern their local affairs. To that end, Section 2, Article IX of the charter provides that "the electors shall have the power to approve or reject at the polls *any ordinance* or resolution passed by the Council, except as hereinafter provided." (Emphasis added.) In this regard, the people of Cuyahoga Falls reserved to themselves the power to deal directly with and challenge, by referendum, certain actions taken by council. Indeed, such a reservation of power is clearly a matter embraced within the field of local self-government. *Dillon v. Cleveland* (1927), 117 Ohio St. 258, 273-274, 158 N.E. 606, 611. See, also, *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 19, 577 N.E.2d 645, 647, citing *Fitzgerald v. Cleveland* (1913), 88 Ohio St. 338, 347, 103 N.E. 512, 514 ("'It is clear upon reason and authority that municipal elections are and should be regarded as affairs relating to the municipality itself, and, in the absence of fundamental limitations prohibiting, are things {*564} that may be provided for by the local government. * * *' Accord *Reutener v. Cleveland* [1923], 107 Ohio St. 117, 133, 141 N.E. 27, 31.").

Appellants contend that referendum powers reserved in a municipal charter are not absolute and are expressly limited by Section 1f, Article II of the Ohio Constitution. Section 1f, Article II provides:

"The initiative and referendum powers are hereby

> reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

Specifically, appellants contend that the language "authorized by law to control by legislative action," as used in Section 1f, Article II, is one of limitation, restricting the right of referendum to only those actions of council that are purely legislative in nature. Therefore, appellants argue that, because the passage of Ordinance No. 48-1996 constituted merely administrative action by council, the trial court and court of appeals erred in determining that the ordinance could properly be submitted to a referendum vote under the charter.

We agree with appellants that the action of council in approving the site plan was essentially administrative in nature. See *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 Ohio Op. 2d 1, 233 N.E.2d 500, paragraph one of the syllabus ("A public body essentially legislative in character may act in an administrative capacity."). It appears that appellants were at all times in compliance with city zoning laws regarding the proposed development. Further, the action of council in approving the site plan consisted, generally, of executing and administering a zoning law previously enacted. See *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 56 Ohio Op. 2d 6, 271 N.E.2d 864, and *State ex rel. Srovnal v. Linton* (1976), 46 Ohio St.2d 207, 75 Ohio Op. 2d 241, 346 N.E.2d 764. However, we disagree with appellants that the citizens of Cuyahoga Falls are prohibited by Section 1f, Article II from voting on the passage of Ordinance No. 48-1996.

In this case, the court of appeals determined that Section

1f, Article II should not be interpreted as a limitation upon referendum powers reserved in a municipal charter. Specifically, the court held that "while this section does establish that the people of Ohio reserved to themselves a right of referendum, we do not find this language was intended to limit their referendum powers, as Buckeye suggests. The constitution does not dictate how municipalities may incorporate a referendum provision into their governing mechanism; nor does it place restrictions upon the nature of the referendum provisions municipalities may employ. The constitution simply reserves to municipalities the power to incorporate a referendum procedure in order to ensure that decisions made by a municipality's governing body are in keeping with the views of its citizens." We agree with the court of appeals' interpretation of this constitutional provision.

{*565} Section 1f, Article II reserves initiative and referendum powers with respect to all questions which municipalities may be authorized by law to control by legislative action, and such powers are to be exercised in the manner provided by law. By its very terms, Section 1f, Article II is not a "self-executing" provision. *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St.2d 147, 53 Ohio Op. 2d 348, 265 N.E.2d 273. Rather, Section 1f, Article II requires ancillary legislation to be effective, and, absent specific *legislative action*, by the governing body, "it merely indicates principles [the right of initiative and referendum] without laying down rules giving them force of law." Black's Law Dictionary (6 Ed.1990) 1360, defining "self-executing constitutional provision."

To carry Section 1f, Article II into effect, the General

Assembly has enacted legislation covering municipal initiative and referendum matters.[1] See R.C. 731.28 through 731.41. However, these sections do not apply to "any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures." R.C. 731.41. Rather, that source of authority is found in Sections 3 and 7, Article XVIII. In *Bramblette*, 24 Ohio St.2d at 149, 53 Ohio Op. 2d at 349, 265 N.E.2d at 274, we stated:

> "Essentially, we have held that Section 1f of Article II (as contrasted to Section 1d of Article II) is not 'self-executing'; that *either* the General Assembly, by the enactment of statutory 'law,' or the people of the municipality, by the adoption of charter 'law' under the 'home-rule' provisions of the Constitution, may

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[1] The General Assembly has also enacted legislation with respect to referendum powers involving county and township zoning matters. See R.C. 303.12(H) and 519.12(H). In Cook-Johnson Realty Co. v. Bertolini (1968), 15 Ohio St.2d 195, 200-201, 44 Ohio Op. 2d 160, 162-163, 239 N.E.2d 80, 84, this court held:

> "What the General Assembly has done in Section 519.12, Revised Code, is to provide the people of the several townships with a power to veto, by use of the device of referendum, zoning resolutions passed by township trustees.
>
> "We find no constitutional impediment to a grant of legislative power by the General Assembly to township trustees to make zoning resolutions, nor for the General Assembly to reserve the power of referendum to the people who will be affected by such resolutions. Therefore, Section 519.12, Revised Code, insofar as it accomplishes these purposes of the General Assembly, is constitutional."

> exempt certain classes of laws from the operation of referendum * * *; that charter provisions, if so adopted, will apply * * *; R.C. 731.41; and that where there are no charter provisions the exercise of such power is only as provided for by the General Assembly * * *." (Emphasis *sic.*) (Citations and footnote omitted.)

In *Bramblette*, this court held that a municipality may, by charter, exempt an ordinance levying a municipal income tax from referendum proceedings. In reaching this conclusion, the court stated:

> "In providing for referendum, however, a municipal charter is not restricted to the adoption of the same provisions enacted by the General Assembly. It may be {*566} *less restrictive* as to use of the referendum, as was the Charter of the city of Toledo which authorized referendum on *all ordinances*, including one levying a tax passed as an emergency measure. *State ex rel. Snyder v. Bd. of Elections* (1946), 78 Ohio App. 194 [33 Ohio Op. 519, 69 N.E.2d 634]. It may be *more restrictive*, as in *Dillon v. Cleveland*, *supra* * * *, where a referendum would have been required under state law, but was not required under the provisions of the Charter of the city of Cleveland." (Emphasis added.) *Bramblette*, 24 Ohio St.2d at 150, 53 Ohio Op. 2d at 350, 265 N.E.2d at 275.

Thus, given the holdings from this court, and applying Section 1f, Article II as written, we disagree with appellants that Section 1f effectively limits referendum powers reserved in a municipal charter to only those actions of council that are purely legislative in nature. The fact that the charter provision

reserves the power of referendum on "any ordinance or resolution," which may involve administrative as well as legislative matters, does not stand as an impediment to the constitutional validity of the powers reserved to the citizens of Cuyahoga Falls in their charter. See 5 McQuillin, Municipal Corporations (3 Ed.Rev.1996) 289, Section 16.54 ("The power of initiative or referendum may be conferred by the sovereignty upon a municipality with respect to any matter, legislative or administrative, within the realm of local affairs; and often the power, as conferred, is extensive, including all ordinances and resolutions and practically all actions that might be taken by a municipal council."). See, also, *State ex rel. Hauck v. Bachrach* (1958), 107 Ohio App. 71, 76, 7 Ohio Op. 2d 402, 405, 152 N.E.2d 311, 315 ("Section 7 of Article XVIII seems to confer upon any municipality the power to frame and adopt for its government without any limitation whatever as to its form or the distribution of power among its departments. The electors of the community have the option of organizing under any one of the optional statutory forms or any hybrid thereof, or of adopting the old New England 'town meeting' system, or any conceivable new or old form, provided it is based on the will of the electors, expressed in the manner prescribed in Article XVIII of the Constitution.").

In analyzing the scope of authority conferred upon municipalities by Section 7, Article XVIII, appellees correctly point out that "the people of a chartered city can create any form of government they want. There is no requirement that a charter city have a planning commission or even a city council. The people need not hire any planning experts. The people of a city can choose to require that all legislation and site plans be approved by a majority of the voters in a town

meeting. * * * In other words, they may reserve to themselves the power to have a direct democracy on all legislative and administrative functions of the city. The power of local self-government means nothing less. * * *"

{*567} Appellants direct our attention to *Myers* and *Srovnal*, and assert that those cases "control the outcome of this case." Appellants contend that both *Myers* and *Srovnal* stand for the proposition that administrative determinations by a legislative municipal body are not subject to referendum "regardless of whether the municipality is chartered or not."

In Myers, paragraphs one and two of the syllabus, we held:

> "1. Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are 'authorized by law to control by legislative action.'
>
> "2. The passage by a city council of a resolution granting a permit for the operation of a sanitary landfill, pursuant to an existing zoning regulation, constitutes administrative action and is not subject to referendum proceedings."

In *Srovnal*, we relied upon *Myers*, and held:

> "Where the city council, under favor of the city's Planning and Zoning Code, by resolution confirms the action of the city planning and zoning commission granting a zoning use exception as to height regulations for a hotel and office building, which exception will not, in the judgment of the commission,

> substantially and permanently injure the appropriate use of neighboring property, and the applicant for such use exception files notarized consents of the owners of 89.47 percent of the area of the land deemed by the commission to be immediately affected by the proposed zoning use exception, such resolution is not legislative but is an administrative act and is not subject to the referendum provisions of R.C. 731.29."

At first glance, both *Myers* and *Srovnal* appear to be supportive of appellants' contentions. However, both cases are distinguishable and are not applicable here. In neither *Myers* nor *Srovnal* did we determine whether a charter provision could constitutionally authorize citizens to challenge the actions of a municipal legislative authority. To be sure, neither *Myers* nor its progeny, *Srovnal*, dealt with referendum powers granted by charter. Thus, appellants' reliance on these cases is misplaced.

Appellants also cite *Forest City Ent., Inc. v. Eastlake* (1975), 41 Ohio St.2d 187, 70 Ohio Op. 2d 384, 324 N.E.2d 740, as further authority for the proposition that the passage of Ordinance No. 48-1996 was not subject to referendum proceedings. In that case, a landowner challenged a city charter provision that required that any change in land use agreed to by the city council must be approved by fifty-five percent of the voters in a city-wide election. Relying on *Myers*, the *Eastlake* court, in Part II of the opinion, indicated that a charter provision could not provide for a referendum with respect to administrative determinations made by city council. In *Eastlake*, the court stated:

> {*568} "Under the provisions of Section 3, Article VIII [of the charter], *all* changes in land use require

> approval by city council. On its face, the charter provision makes no distinction between those changes made by council in an administrative capacity, and those made by council in a legislative capacity. Thus, the requirement of a mandatory referendum falls upon all changes with equal weight. Insofar as this purports to mandate a referendum as to an administrative determination, it is clearly invalid.
>
> "* * *
>
> "However, construing the mandatory referendum requirement as applying only to those land-use changes granted by council acting in a legislative capacity, we must determine whether such a requirement denies appellant due process of law." (Emphasis *sic.*) (Citations omitted.) *Id.*, 41 Ohio St.2d at 191, 70 Ohio Op. 2d at 386, 324 N.E.2d at 743-744.

The *Eastlake* court then held that the municipal charter provision at issue was an unlawful delegation of legislative power in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, the court in *Eastlake* did not address the scope of referendum power with respect to the authority conferred upon municipalities by Sections 3 and 7, Article XVIII of the Ohio Constitution. Rather, the court in Part II of *Eastlake* simply relied on our holding in *Myers*, which, as noted above, did not involve referendum powers granted by a charter. In this regard, we specifically disapprove of the dicta in Part II of *Eastlake* to the extent that it may be interpreted to undermine the authority conferred upon chartered municipalities by Sections 3 and 7, Article XVIII.

Furthermore, we also note that, on appeal, the United States Supreme Court overruled the part of *Eastlake* wherein this court held that the charter provision providing for a mandatory referendum was an unlawful delegation of legislative power. See *Eastlake v. Forest City Ent., Inc.* (1976), 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132. Specifically, the United States Supreme Court held that such a provision in a charter was constitutional, and stated:

> "The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See, *e.g.*, The Federalist No. 39 (J. Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. *Hunter v. Erickson*, 393 U.S. 385, 392 [89 S. Ct. 557, 561, 21 L. Ed. 2d 616, 623] (1969).
>
> {*569} "The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' *James v. Valtierra*

> [(1971), 402 U.S. 137, 28 L. Ed. 2d 678, 91 S. Ct. 1331], at 141 [402 U.S. 137, 91 S. Ct. 1331, at 1333, 28 L. Ed. 2d 678, at 682]." (Footnotes omitted.) *Eastlake v. Forest City Ent., Inc.*, 426 U.S. at 672-673, 96 S. Ct. at 2361-2362, 49 L. Ed. 2d at 137.

Therefore, we hold that Sections 3 and 7, Article XVIII of the Ohio Constitution confer upon municipalities the authority "to exercise all powers of local self-government." Section 1f, Article II of the Ohio Constitution does not limit that authority. Accordingly, in accordance with Sections 3 and 7, Article XVIII, the people of a municipality may, by charter, reserve to themselves the power to approve or reject, by popular vote, any actions of city council regardless of whether such actions are administrative or legislative in nature.

In *State ex rel. Doerfler v. Otis* (1918), 98 Ohio St. 83, 94, 120 N.E. 313, 316, we held that "where the language of a charter is plain, clear, and unambiguous, it must be given its usual and ordinary meaning, and if such construction is not in accord with the intent and purpose of the electors the remedy is by amendment of the charter." Section 2, Article IX of the charter is plain, clear, and it unambiguously states that the people of Cuyahoga Falls "have the power to approve or reject at the polls *any ordinance or resolution* passed by Council, except as hereinafter provided."[2] (Emphasis added.)

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[2] Additionally, even assuming, *arguendo*, that Section 2, Article IX of the charter is ambiguous (which it clearly is not), this court has held that any ambiguity in a charter provision should be liberally construed in favor of permitting the people to vote on the issue. See *State ex rel. Sharpe v. Hitt* (1951), 155 Ohio St. 529, 535, 44 Ohio Op. 489, 491, 99 N.E.2d 659, 662 ("This and

The exceptions to referendum {*570} set forth in the charter are not applicable here.[3] The referendum provision in the

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other courts have declared that constitutional, statutory or charter provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object clearly sought to be attained should be promoted rather than prevented or obstructed."), citing *State ex rel. Middletown v. Middletown City Comm.* (1942), 140 Ohio St. 368, 24 Ohio Op. 297, 44 N.E.2d 459. See, also, *State ex rel. Lewis v. Hamilton Cty. Bd. of Elections* (1995), 74 Ohio St.3d 1201, 1202, 655 N.E.2d 177, 178 (Moyer, C.J., concurring) ("Active participation in the election process is the foundation of democracy. Whether selecting a candidate for public office or deciding issues of public concern, voting is a basic right without which all other rights become meaningless. It follows that where the Ohio Constitution or statutes establishing the requirement for placing issues on election ballots create doubt, such doubt should be resolved in favor of providing the citizens with access to the ballot."); and *Shryock v. Zanesville* (1915), 92 Ohio St. 375, 386, 110 N.E. 937, 940 ("Meanwhile it is the solemn duty of all courts to keep hands off and to avoid giving to the provisions of the constitution on that subject [initiative and referendum] a strained construction which, by reason of its very burdensomeness and unreasonableness, would tend to depopularize it. Such character of construction is as unwarranted as judicial construction tending to weaken or emasculate the theory [of initiative and referendum].").

[3] Section 2, Article IX of the Cuyahoga Falls Charter also provides that "when the Council by general law or under provisions of general ordinance is required to pass more than one ordinance or resolution necessary to make and pay for any public improvement, the referendum provision shall apply only to the first ordinance or resolution required to be passed and not to any

charter does not provide for, or even suggest, any distinctions between actions by council that are legislative or administrative in character. In this regard, the people of Cuyahoga Falls have, by virtue of their charter, reserved to themselves the right to exercise a part of their inherent political power[4] and determine what actions of council are subject to a referendum vote. The people of Cuyahoga Falls have spoken through their charter, and we will not disturb their clear intentions.

For all the foregoing reasons, we affirm the judgment of the court of appeals.

Judgment affirmed.

Resnick, F.E. Sweeney and Lundberg Stratton, JJ., concur.

Moyer, C.J., Pfeifer and Cook, JJ., dissent.

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subsequent ordinances or resolution relating thereto. In addition, ordinances providing for an annual tax levy or for improvements petitioned for by the owners of a majority of the foot front of the property benefited and to be specially assessed therefor, and appropriation ordinances limited to the subject of apporpriations [*sic*] shall not be subject to referendum, but, except as herein provided, all other ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, including emergency ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, shall be subject to referendum, except that such emergency ordinances and resolutions shall go into effect at the time indicated therein."

[4] Indeed, "all political power is inherent in the people." See Section 2, Article I of the Ohio Constitution.

DISPOSITION

Judgment affirmed.

DISSENT

MOYER, C.J., dissenting. I respectfully dissent because the citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

I

Paragraph one of the syllabus in the majority opinion states that Section 1f, Article II of the Ohio Constitution does not limit the authority of municipalities to exercise the powers of self-government conferred by Sections 3 and 7 of Article XVIII. I disagree.

{*571} While the Home Rule Amendment grants broad powers to municipalities, the scope of those powers is confined by the remaining clauses of the Constitution. Section 3, Article XVIII provides, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." In *Canton v. Whitman* (1975), 44 Ohio St.2d 62, 73 Ohio Op. 2d 285, 337 N.E.2d 766, this court interpreted Section 3, Article XVIII: "This section, adopted in 1912, preserved the supremacy of the state in matters of 'police, sanitary and other similar regulations,' while granting municipalities sovereignty in matters of local self-government, *limited only by other constitutional provisions*. Municipalities may enact police and similar regulations under their powers

of local self-government, but such regulations 'must yield to general laws of statewide scope and application * * *.' " (Emphasis added.) *Id.* at 65, 73 Ohio Op. 2d at 287, 337 N.E.2d at 769. Thus, true sovereignty of municipal governments can be limited only by other provisions of the Constitution with respect to matters that are not of "police, sanitary and other similar regulations." Conversely, it is evident that matters of "police, sanitary and other similar regulations" are subject to the supremacy of state power, *i.e.*, "general laws of statewide scope and application," as well as other provisions of the Constitution that may limit the exercise of this power.

Similarly, we described the limits of charter government by interpreting Section 7, Article XVIII, as follows: "A municipality that chooses to adopt a charter does so in order to manage its own purely local affairs without interference from the state, *with the understanding that those local laws will not conflict with the constitution and general laws.*" (Emphasis added.) *Rispo Realty & Dev. Co. v. Parma* (1990), 55 Ohio St.3d 101, 102, 564 N.E.2d 425, 426-427.

In *Bazell v. Cincinnati* (1968), 13 Ohio St.2d 63, 42 Ohio Op. 2d 137, 233 N.E.2d 864, paragraph one of the syllabus, the court held that a "charter city has all powers of local self-government *except to the extent that those powers are taken from it or limited by other provisions of the Constitution* or by statutory limitations on the powers of the municipality which the Constitution has authorized the General Assembly to impose." (Emphasis added.) Therefore, any exercise of municipal authority under charter and pursuant to Section 3 must not, in order to be valid, conflict with any remaining provision of the Constitution. In essence, the authority to

"exercise all powers of local self-government" is a delegation of the power to exercise all powers that are within the bounds of the Constitution.

The constitutional provision at issue here is Section 1f, Article II, which states that "the initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter {*572} be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

Assuming, without analyzing, that the majority is correct in concluding that Section 1f, Article II is not a self-executing provision, see *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St.2d 147, 53 Ohio Op. 2d 348, 265 N.E.2d 273, governing bodies that may act to execute the powers of referendum and initiative as stated in Section 1f, Article II are municipal legislative bodies, where a municipality is governed by charter, and the General Assembly, which provides governing law on referendum and initiative matters for noncharter municipalities. R.C. 731.28 through 731.41.

However, when either a city council of a charter municipality or the General Assembly acts to execute the powers of Section 1f, Article II, the powers conferred by such an action cannot, by the very nature of the source, exceed the scope of the referendum and initiative powers contained in Section 1f, Article II. The legislative body may act only to execute those referendum and initiative powers that were reserved to the people of municipalities, by the people of the state, as stated in Section 1f, Article II.

As the United States Supreme Court stated in *Eastlake v.*

Forest City Ent., Inc. (1976), 426 U.S. 668, 672, 96 S. Ct. 2358, 2361, 49 L. Ed. 2d 132, 137, "under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." Therefore, to the extent that the action of a legislative body is required to execute power that the people have reserved for themselves, i.e., to execute a nonself-executing provision, the legislative body, in doing so, may not go beyond the power that has been reserved. Such an improper action would violate the intentions of the people of Ohio who established the Constitution, with the principle, among others, that any powers not so kept are assigned by the people, to be considered and decided on behalf of the people, by their representatives in legislative bodies.

Applying these principles to the majority's analysis of the "nonself-executing" nature of Section 1f, Article II, it is apparent that the majority's conclusions are not correct. In arriving at the determination that Section 1f, Article II does not limit the authority of municipalities to exercise local governing power, the majority confuses the original source of authority for initiative and referendum measures. The majority's view implies that all a legislative body must do to execute Section 1f, Article II is enact legislation providing for initiative and referendum rights. Under the majority's conclusions, charter municipalities may grant greater initiative and referendum rights than the General Assembly may grant to noncharter municipalities, despite the fact that the source for granting these powers in both cases is the same--Section 1f, Article II.

{*573} For charter municipalities, the source of authority, according to the majority, is "found in Sections 3 and 7,

Article XVIII." However, what this truly means is that the *source of authority to carry into effect* Section 1f, Article II, for charter municipalities, is Sections 3 and 7 of Article XVIII. The source of authority to carry into effect Section 1f, Article II, for the General Assembly, is Section 1, Article II. Those provisions used to carry into effect Section 1f, Article II are limited to executing only the powers specified in Section 1f, Article II. There is no constitutional authority given by the people to go beyond the meaning of Section 1f, Article II.

By its syllabus that Section 1f, Article II does not limit the authority of municipalities to "exercise all powers of local self-government," the majority has overlooked that any action to carry into effect the provisions of Section 1f, Article II must be consistent with the limits established by that provision, since *it is the sole constitutional source of referendum and initiative powers*. Otherwise, the meaning of any constitutional provision we deem to be nonself-executing could be altered by the words of the legislation that is enacted to carry the provision into effect. The grant of local governing power to carry into effect Section 1f, Article II is therefore limited to actions that are consistent with the words of that provision.

Therefore, an analysis of Section 1f, Article II is required to determine the scope of referendum and initiative powers that the people have reserved to themselves and, correspondingly, what powers are delegated to the legislative branches. It is this analysis that then determines the validity of the charter provision at issue here, i.e., whether the powers of referendum and initiative granted by that charter provisions are within the bounds of Section 1f, Article II.

II

"The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself." *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St.3d 513, 520, 644 N.E.2d 369, 375. Section 1f, Article II provides, in part, that "the initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by *legislative action*." (Emphasis added.) Therefore, whether the submission of the issue to the voters by the city in this case was constitutional turns on the meaning of "legislative action," and if that issue was one that the municipality was authorized to determine by legislative action.

Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning. See *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995, 998; R.C. 1.42. {*574} Black's Law Dictionary (6 Ed.1990) 899, defines "legislative" as "making or giving laws; * * * actions which relate to subjects of permanent or general character are 'legislative.' " Similarly, "legislative act" is defined as the "enactment of laws. Law * * * passed by legislature in contrast to court-made law. *One which prescribes what the law shall be in future cases arising under its provisions*." (Emphasis added.) *Id*. Accordingly, the phrase "legislative action," taken in its usual and customary meaning, is essentially the process by which law is enacted that prescribes what the law shall be in future cases arising under its provisions. The wording of Section 1f, Article II therefore means that initiative and referendum powers are reserved on all questions that a municipality may determine legislatively, *i.e.*, on all questions that are resolved by enacting laws that have a general,

prospective application.

In determining whether the issue here was one that the city was authorized to control by legislative action, it first must be understood that the distinction by this court in the past, and by the parties here, between "legislative" and "administrative" actions does not truly capture the actual meaning of "legislative action" as stated in Section 1f, Article II. That distinction is incorrect because administrative actions may include, according to general principles of administrative law, the performance of "quasi-legislative," or rulemaking, as well as "quasi-judicial," or adjudicatory, functions. The true determination to be made is whether a city council, acting pursuant to its administrative powers, see *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 Ohio Op. 2d 1, 233 N.E.2d 500, paragraph one of the syllabus, is acting in a legislative or judicial capacity. Indeed, the first step in analyzing an administrative action is to determine whether the process is one of adjudication or rulemaking. 1 Koch, Administrative Law and Practice (2 Ed.1997) 45, Section 2.11.

An administrative action that is adjudicatory is a "determination of individual rights or duties." *Id.* It is a decision-making process that applies "preexisting standards to individual circumstances," and uses the specific facts of the case "to decide whether a given rule is applicable." Any resultant policy making is incidental to the dispute. *Id.* at 46. See, also, *Londoner v. Denver* (1908), 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103. Administrative adjudications are often initiated by private citizens. "Private individuals find that they cannot engage in a certain conduct or activity without clearance from an administrative agency." 2 Koch at

119, Section 5.31. "The applicant will first receive an administrative determination and the hearing will result only if the applicant chooses to challenge the result of that determination. One aspect of an application for a license or permit is that there are competing private interests." *Id.*

By contrast, rulemaking is more like the activity of legislating. See 1 Koch at 47, Section 2.11. While the processes used to establish rules sometimes differ {*575} from typical legislative processes, the objective and the outcome of rulemaking is similar--the implementation of law or policy for the future. See *United States v. Florida East Coast Ry. Co.* (1973), 410 U.S. 224, 244-246, 93 S. Ct. 810, 820-821, 35 L. Ed. 2d 223, 239-240. Rulemaking is characterized by a focus on general issues that affect future conduct, with an intent on making policy determinations: "The core facts in rulemaking are general facts. Rulemaking is investigation rather than individual dispute resolution and hence it is often said to be by nature legislative. It is a legislative-like activity because it focuses on resolving some sort of policy-type question and not merely resolution of factual disputes." 1 Koch at 48, Section 2.11. See, also, *Bi-Metallic Investment Co. v. State Bd. of Equalization* (1915), 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372. Many of the rules established pursuant to the rulemaking process envision some form of public participation, a feature which is not apparent in adjudicatory proceedings. See 1 Koch at 325-326, Section 4.11.

The difference between adjudicatory and rulemaking administrative actions is important because city councils may preside over the performance of these functions by a variety of administrative agencies. "[A] city council may perform not

only legislative acts, but administrative acts as well." *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 13, 56 Ohio Op. 2d 6, 7, 271 N.E.2d 864, 865. "A public body essentially legislative in character may act in an administrative capacity." *Donnelly*, at paragraph one of the syllabus. When a city council has acted to approve or exercise final decision over an "administrative action" by an agency, as has happened in this case, the underlying nature of the act, *i.e.*, adjudicatory or legislative, is critical because it is determinative of whether the final action by city council constitutes "legislative action," or whether council is acting as the final arbiter in an adjudicatory process. If, for example, a city council participates as the final decisionmaker in the rulemaking process by approving the establishment of a rule, then it may be said that the council has acted, albeit in an administrative capacity, by "legislative action." It has acted pursuant to a process that enacts law prescribing what the law shall be in future cases arising under its provisions. By contrast, if a city council has acted as the final decisionmaker in an adjudicatory matter that involves a determination of individual rights or duties by applying preexisting standards to a specific set of facts, then the action taken, whether by resolution or ordinance, cannot be said to be legislative. Rather, council is acting as a final arbiter, which cannot constitute "legislative action" that would permit the people to exercise initiative and referendum rights over such an action pursuant to Section 1f, Article II.

Applying those principles to this case, it is evident that the Cuyahoga Falls City Council acted in an adjudicatory manner when it passed Ordinance No. 48-1996 approving the plan for "development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such

district and {*576} zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-6-96-SP." By the very words of the ordinance, the action by the council approves the Planning Commission's application of the zoning regulations to Buckeye's plan. Thus, the ordinance is a final determination of an application of the preexisting zoning standards to the individual plan submitted by the appellees. There are no rules approved in the ordinance, of the Planning Commission or any other agency, that are general and prospective in nature. There is no approval of any general public policy. The action taken by city council was an adjudicatory administrative action, which cannot by any definition fall under the phrase "legislative action" enumerated in Section 1f, Article II. Thus, there are no initiative or referendum rights which may be exercised on this question.

An analysis of the cases upon which Buckeye relies, *Myers v. Schiering*, and *State ex rel. Srovnal v. Linton* (1976), 46 Ohio St.2d 207, 75 Ohio Op. 2d 241, 346 N.E.2d 764, illustrates the correctness of the above approach in analyzing the true nature of "administrative actions" in interpreting "legislative action" under Section 1f, Article II. Like the case here, the underlying administrative actions in both cases were individualized, fact-specific matters which required an application of existing regulations to each circumstance. In *Myers*, the city council passed a resolution granting a permit to operate a landfill. In *Srovnal*, the city council adopted a resolution approving the Solon Planning and Zoning Commission's issuance of a permit to build a hotel and office complex. *Srovnal*, 46 Ohio St.2d at 209, 75 Ohio Op. 2d at 242, 346 N.E.2d at 765-766. In both cases, this court held

that the actions were not subject to referendum. *Myers*, at paragraph two of the syllabus; *Srovnal*, at syllabus. As in this case, both of the administrative actions there were adjudicatory in nature.

III

The majority opinion rests upon the assumption that because of Article XVIII, there is a difference in the initiative and referendum powers enjoyed by charter municipalities as opposed to noncharter municipalities. The majority's distinction is one without a difference. Neither a charter nor a noncharter municipality can grant greater powers than those allowed by the Ohio Constitution. In this case, neither can grant more initiative or referendum power than what is permitted by Section 1f, Article II. An executing action going beyond the scope of Section 1f, Article II is not a valid action because there is no constitutional authority for such an action.

{*577} For the foregoing reasons, the judgment of the court of appeals should be reversed.

Pfeifer, J., concurs in the foregoing dissenting opinion.

COOK, J., dissenting. Section 1f, Article II of the Ohio Constitution reserves the powers of referendum and initiative to the voters of Ohio's municipalities. Under that section, however, referendum and initiative are available only with regard to "legislative action." Nothing in either Section 1f, Article II, or the Home Rule Amendment, permits a municipality to overcome this limitation by adopting a charter that allows for broader powers of initiative and referendum. The powers of self-government possessed by a municipality pursuant to the Home Rule Amendment to the Ohio Constitution may not exceed the limitations placed on those

powers by other constitutional provisions. *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 20-21, 577 N.E.2d 645, 647-648. Moreover, whether the municipality is chartered or nonchartered is irrelevant: Section 1f, Article II of the Constitution is the sole grant of referendum and initiative powers to both types of municipalities and its limitation applies equally.

For the foregoing reasons, I concur in Part I of Chief Justice Moyer's dissenting opinion.

APPENDIX H

COURT OF APPEALS OF OHIO
NINTH APPELLATE DISTRICT
SUMMIT COUNTY

C.A. NO. 17933

December 11, 1996, Dated

BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL., Appellants

vs.

CITY OF CUYAHOGA FALLS, ET AL., Appellees

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF SUMMIT, OHIO. CASE NO. CV96-05-1701.

COUNSEL

APPEARANCES:

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MAUREEN O'CONNOR, Summit County Prosecutor, AND WILLIAM E. SCHULTZ, Assistant Prosecutor, 53 University Avenue, Akron, Ohio 44308, for Appellee.

JUDGES

JOHN W. REECE, Judge. BAIRD, P.J., SLABY, J., CONCUR

AUTHOR: REECE

OPINION

DECISION AND JOURNAL ENTRY

Dated: December 11, 1996

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

REECE, Judge.

Appellant Buckeye Community Hope Foundation appeals the decision of the Summit County Court of Common Pleas denying preliminary and permanent injunctive relief. We affirm.

I.

Buckeye Community Hope Foundation is a non-profit organization which develops property for the purpose of creating affordable housing opportunities. On June 12, 1995, Buckeye purchased a parcel of land located in the city of Cuyahoga Falls to use for this purpose. Early in 1996, Buckeye submitted a site plan proposal for the construction of a seventy two unit apartment complex on the parcel to the City of Cuyahoga Falls Planning Commission. The Planning Commission approved the site plan and, pursuant to the Cuyahoga Falls Municipal Charter, the proposal was referred to the Cuyahoga Falls City Council. On April 1, 1996, the City Council approved the site plan by passing ordinance # 48-1996.

In response to the passage of ordinance # 48-1996 by the City Council, certain Cuyahoga Falls electors who opposed the housing project circulated a referendum petition to place the issue on the November, 1996 ballot. The voters filed the petition with the Clerk of the City Council, seeking that ordinance # 48-1996 be submitted to a vote of the electors, as provided for by Article IX, Section 2 of the Cuyahoga Falls Municipal Charter. The Board of Elections certified the referendum petition as valid. In light of the pending referendum, the City Council refused to issue a building permit to Buckeye.

In an attempt to keep the referendum off the November ballot, Buckeye filed an action against the City Council in common pleas court. The complaint sought injunctive relief and a declaratory judgment against the City Council. Buckeye alleged that the passage of Ordinance # 48-1996 was an administrative act by the council and as such, submission of

the ordinance to a referendum violated the Ohio Constitution. Further, Buckeye alleged the referendum prejudiced them in that it prevented them from commencing construction of the proposed apartment complex. Buckeye sought injunctive relief to halt the placement of the referendum on the November ballot.

On May 15, 1996 the trial court heard Buckeye's motion for injunctive relief. The parties agreed to consider the hearing as a trial on the merits of the case. On May 31, 1996, the common pleas court ruled that the charter of Cuyahoga Falls reserved to the citizens the right of referendum for ordinances such as # 48-1996. Thus, the court denied Buckeye both preliminary and permanent injunctive relief, thereby dismissing the action. The court noted that the judgment was a final appealable order. Following the entry of judgment, Buckeye appealed to this court.

II.

Buckeye asserts the following assignment of error:

> The Trial Court erred to the prejudice of the Plaintiffs-Appellants by denying Plaintiffs-Appellants' motion to (*sic.*) for temporary restraining order and for preliminary and permanent injunctive relief.

Buckeye contends injunctive relief to stop the referendum is proper because the referendum procedure is inappropriate in this instance. It argues citizens may only exercise the right of referendum as a challenge to legislative action by a municipality. Buckeye charges the passage of ordinance # 48-1996 was an administrative action by the City Council and, as such, should not have been subject to a referendum. We disagree.

The City of Cuyahoga Falls is a chartered municipality, deriving its power from Article XVIII of the Ohio Constitution. Article XVIII, known as the Home Rule Amendment, was adopted in 1912 and constructed to allow individual municipalities the power to control their own local affairs. Section three of the Home Rule Amendment specifically gives municipalities "authority to exercise all powers of local self-government[.]" Section 3, Article XVIII, Ohio Constitution. Further, Section 7 of the amendment provides that "any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Section 7, Article XVIII, Ohio Constitution.

In keeping with the Home Rule provisions of the constitution, the citizens of Cuyahoga Falls enacted a charter by which they chose to govern themselves. In this charter the citizens incorporated the means by which they would order and control the affairs of the municipality. Section 2, Article 9 of the Cuyahoga Falls charter states "the electors shall have the power to approve or reject at the polls *any* ordinance or resolution passed by the Council[.]" (Emphasis added.) By including this section in the charter, the citizens of Cuyahoga Falls reserved to themselves the right of referendum on all actions of the council, as the Ohio Constitution entitles them to do under the Home Rule Amendment. See *Village of Perrysburg v. Ridgway* (1923) 108 Ohio St. 245, 140 N.E. 595.

Buckeye argues the referendum provision of the charter may only be applied to legislative decisions made by the city council. It charges that, pursuant to Section 1(f), Article II of

the Ohio Constitution, citizens of municipalities are not allowed a right of referendum for administrative actions. Section 1(f) provides:

> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions such municipalities may now or hereafter be authorized to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Section 1(f), Article II, Ohio Constitution.

While this section does establish that the people of Ohio reserved to themselves a right of referendum, we do not find this language was intended to limit their referendum powers, as Buckeye suggests. The constitution does not dictate how municipalities may incorporate a referendum provision into their governing mechanism; nor does it place restrictions upon the nature of the referendum provisions municipalities may employ. The constitution simply reserves to municipalities the power to incorporate a referendum procedure in order to ensure that decisions made by a municipality's governing body are in keeping with the views of its citizens.

Municipalities are not prohibited from expanding upon the referendum rights included in the constitution. See *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St.2d 147, 265 N.E.2d 273. Section 1(f), Article II provides a minimum referendum standard which applies to all municipalities. Citizens of chartered municipalities may choose to expand the right of referendum beyond this standard. The Home Rule Amendment, adopted after Section 1(f), Article II, increased the self-governing powers of municipalities and allowed the

extension of referendum rights through municipal charter provisions. See *Dillon v. Cleveland* (1927), 117 Ohio St.. 258, 158 N.E. 606. Thus, the referendum right of citizens of chartered municipalities is not limited to legislative actions.

The Home Rule Amendment of the Constitution resolves the question of the power of local self-government under a city charter. *Piqua v. Piqua Daily Call* (1979), 64 Ohio App.2d 222, 225, 412 N.E.2d 1331. Home Rule gives municipalities a sovereignty over matters of local government. In such matters, if a provision of a municipal charter conflicts with state law, the charter provisions will prevail. *State ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St.3d 106, 108-109, 524 N.E.2d 447. A municipal charter provision incorporating stricter referendum provisions than provided for by state statute is a constitutional exercise of municipal power. See *Dillon v. Cleveland* (1927), 117 Ohio St. at 172-176. This court relied upon *Dillon* when it held a stricter charter initiative provision to be constitutional in a journal entry judgment in *State ex rel. Samanich v. Vierkorn* (July 12, 1995), 1995 Ohio App. LEXIS 2972, Lorain App. No. 95 CA 006149, unreported. Thus, the citizens of Cuyahoga Falls, under Home Rule, may reserve to themselves in their charter the right of referendum over "any ordinance or resolution," whether legislative or administrative, without sanction by the state.

The right of referendum is "a classic demonstration of 'devotion to democracy[.]'" *Eastlake v. Forest City Enterprises, Inc.* (1976), 426 U.S. 668, 679, 49 L. Ed. 2d 132, 141, 96 S. Ct. 2358. (Citation omitted.) A referendum is more than "an expression of *** neighborhood preference;" it is a mechanism for the citizens of a municipality to assert

their interests and maintain a check over their elected representatives. *Id.* at 678, 49 L. Ed. 2d at 140. (Citation omitted.) The people may reserve to themselves the power of referendum in order to ensure their direct participation in the political process and to protect their interest in questions of public policy. *Id.* at 673, 49 L. Ed. 2d at 137. The people of Cuyahoga Falls included the referendum provision in their charter in order to maintain a degree of direct control over their municipality's management of policy issues. They have used the referendum procedure for that purpose in this instance.

As provided for by the Home Rule Amendment of the Ohio Constitution, the citizens of Cuyahoga Falls formulated a city charter by which to govern themselves. Within that charter they protected their interest in public policy concerns by reserving to themselves the right to review "any ordinance or resolution" passed by the city council. The people have chosen to assert this right in order to review the passage of ordinance # 48-1996.

III.

Buckeye's single assignment of error is overruled. The decision of the trial court denying preliminary and permanent injunctive relief is affirmed. Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall

constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellants.

Exceptions.

JOHN W. REECE

FOR THE COURT

BAIRD, P.J.

SLABY, J.

CONCUR

DISPOSITION

Judgment affirmed.

APPENDIX I

COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Case No. CV 96 05 1701

BUCKEYE COMMUNITY HOPE FOUNDATION, et al., *Plaintiffs*	)
vs.	)
CITY OF CUYAHOGA FALLS, et al., *Defendants*	)

JUDGMENT ORDER
May 31, 1996, Dated

Judge Murphy,

This cause came on before this Court on the 15th day of May, 1996, for preliminary and permanent injunction (agreed to and consolidated by the parties at said hearing.) Upon the Plaintiffs' request that the Court issue an injunction barring the Cuyahoga Falls city Council from approving a referendum vote I and transmitting said request for inclusion on the ballot this year, which had been initiated by certain electors of their community.

Chronologically, the city Council had approved certain plans of the Plaintiffs for a housing development in their community after which a group of citizens had petitioned for a referendum on that matter, which was forwarded to the Board of Elections, approving the various numbers of signatures needed along with the identifying resolution. This was then forwarded back to the Cuyahoga Falls city Council, which must then vote to certify it as an election ballot issue.

It is this vote that the Plaintiffs seek to stop by this injunction from the Cuyahoga Falls City Council's ordering it on the ballot.

The Plaintiffs complained that if the referendum is to go forward in November, 1996, their financial backers will pullout, an once "off schedule," those sources of funds would not be available to them. It is for this reason that the Plaintiffs' request a preliminary injunction or permanent injunction to restrain and permit any further action related to the referendum proceedings being taken by Cuyahoga Falls city Council, and/or Gregg Wagner, in submitting that ordinance to the Summit County Board of Elections for either a special or general election.

In Section 2, Article 9, of the Cuyahoga Falls Charter, it states:

> "The electors shall have the power to approve or reject at the polls any ordinance or resolution passed by the council. .."

The citizens of the City of Cuyahoga Falls have reserved to themselves the right of referendum on any matter coming before the City Council which they choose. That provision has been interpreted to mean administrative or legislative matters.

since the Charter provision reserved the right of people to review by referendum matters considered by their city Council, this referendum is no different. See *City of Eastlake, et al. Petitioners, v. Forest City Enterprises, Inc.* at 426 U.S. 668, 96 Sup. Ct. 2358. For all of the above reasons, the Motion for Preliminary or Permanent Injunction of the Plaintiffs is hereby DENIED.

It is so ordered.

/s/ Judge James E. Murphy

cc: Attorney Virgil E. Arrington,
Attorney J. Drew McFarland
Attorney Edward G. Kramer
Prosecutor Maureen O'Connor

APPENDIX J

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Section 1 of the Fourteenth Amendment to the United States Constitution.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 28 U.S.C. 1738.

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be

proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

4. 42 U.S.C. 3604.

"As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful -

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national

origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of -

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of -

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes -

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that -

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as ''ANSI A117.1'') suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such

dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term ''covered multifamily dwellings'' means -

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall

be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."

5. Article IX, Section 2, Cuyahoga Falls Charter

The electors shall have the power to approve or reject at the polls any ordinance or resolution passed by the Council, except as hereinafter provided. Only electors of the City may circulate referendum petitions. Within thirty (30) days after the passage by the Council of such ordinance or resolution or its repassage over the Mayor's veto, whichever is later, a petition signed by at least ten percent (10%) of the electors of the City may be filed with the Clerk of the Council, requesting that such ordinance or resolution be either repealed or submitted to a vote of the electors. If said petition is signed by twenty percent (20%) or more of such electors, the date of the election may be fixed therein, not less than ninety (90) days from the time of filing thereof. When such petition is filed, the Clerk shall first ascertain the sufficiency of the petition, and if found sufficient, the Council shall thereupon, within thirty (30) days of the filing of such petition, reconsider such ordinance or resolution. If upon such reconsideration the ordinance or resolution is not repealed, the Council shall provide for submitting it to a vote of the electors on the date so fixed, or, if not so fixed, at the first general election in any year occurring more than ninety (90) days from the filing of such petition. No such ordinance or

resolution shall go into effect until approved by a majority of those voting thereon, in which event such ordinance or resolution shall go into effect on the fifth day after the day on which the Board of Elections certifies the official vote thereon. When the Council by general law or under provisions of general ordinance is required to pass more than one ordinance or resolution necessary to make and pay for any public improvement, the referendum provision shall apply only to the first ordinance or resolution required to be passed and not to any subsequent ordinances or resolution relating thereto.

In addition, ordinances providing for an annual tax levy or for improvements petitioned for by the owners of a majority of the foot front of the property benefited and to be specially assessed therefor, and appropriation ordinances limited to the subject of appropriations shall not be subject to referendum, but, except as herein provided, all other ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, including emergency ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, shall be subject to referendum, except that such emergency ordinances and resolutions shall go into effect at the time indicated therein. If, when submitted to a vote of the electors, an emergency measure be not approved by a majority of those voting thereon, it shall be considered repealed as regards any further action thereunder; but such measure shall be deemed sufficient authority for payment, in accordance therewith, of any expense incurred previous to the referendum vote thereon.

Ordinances or resolutions submitted to the Council by initiative petition and passed by the Council either with or without change, but not submitted to a vote of the electors shall be subject to referendum in the same manner as other ordinances or resolutions.

6. Cuyahoga Falls Ordinance 1144.04 Planning Commission Consideration.

The Commission shall consider the location of buildings, parking areas and other features with respect to the topography of the lot, existing natural features such as streams and large trees, the efficiency, adequacy and safety of the proposed layout of internal streets and driveways, the location of the green area provided, bearing in mind the possible effects of irregularly shaped lots, the adequacy, location, landscaping and screening of the parking lots and such other matters as the Commission may find to have a material bearing upon the stated standards and objectives of the various district regulations.

If the Commission finds that a proposed plan of development does not meet the purposes of this Zoning Ordinance, it shall disapprove the plan and shall submits its findings in writing, together with the reasons therefor, to the applicant, within sixty days after having received the site plan. If no action has been taken by the Commission within such time, then such plan shall be deemed to have been approved; provided, however, that the applicant may waive this time limit and consent to the extension of such period, in which event he shall give notice of the waiver to the Planning Commission.

Supreme Court, U.S.
FILED
APR 3 2002

No. 01-1269

In The Supreme Court of the United States

CITY OF CUYAHOGA FALLS, et al.,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the decision of the Court of Appeals in this case when that decision is consistent with its own prior precedent, with the decisions of other circuits, and with decisions of this Court.

2. Whether a City should be held immune from liability for its actions that violate constitutional and statutory rights of citizens merely because those violations are accomplished by means of a referendum.

3. Whether this Court should review the decision of the Court of Appeals denying *res judicata* effect to a state court judgment on a related case when the question of whether the doctrine of *res judicata* acts as a bar to the instant case is entirely dependent on the interpretation of state law and the District Court engaged in an exhaustive analysis of applicable Ohio law in determining that Ohio's declaratory judgment exception to the doctrine of *res judicata* applies here.

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STATEMENT OF THE CASE AND FACTS

Respondent Developers[1] paid a premium price to purchase multifamily zoned property in the City of Cuyahoga Falls, Ohio, to construct an affordable apartment complex. (Pet. App. 17a) In developing their project, Developers complied with all site plan and zoning requirements, as well as with additional requirements imposed on them by the City. Faced with vocal opposition from residents of the City, a homogeneous community that is composed of 98% white residents, based on perceptions that African-Americans and families with children would move into Developers' housing complex, City officials allowed an unconstitutional referendum to be placed on the ballot and refused to issue the necessary building permits. By giving effect to a referendum petition, and to the motivations of certain of its citizens, the City sought to pull Developers' vested property rights out from under them.

The facts are clearly delineated by the Court of Appeals in its opinion. (Pet. App. A) The recitation of facts by the Petitioner omits a number of important matters. For instance, as the Sixth Circuit noted, the City Engineer sought advice from the City Law Director concerning the effect of the referendum petition on his authority to issue building permits for the Developers' property. (Pet. App. 9a) The City made the decision to not issue the building permits prior to any court decision on the legality of the referendum. Petitioner claims that the

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[1] The term "Developers" will be used throughout this brief to refer to Buckeye Community Hope Foundation; Buckeye Community Three, L.P.; and Cuyahoga Housing Partners, Inc.; in other words, all the Respondents except Fair Housing Contact Service.

Mayor's failure to sign the ordinance "pocket approved" it, even though admitting that the Mayor opposed the ordinance. (Pet. App. 3) The Mayor's failure to sign the ordinance, however, affected the timing of the decision to deny permits to the Developers. More important is the significant evidence of both the racial nature of the opposition to the housing project by citizens, including the organizers of the referendum petition drive, and of the encouragement given to those organizers by the Mayor. (Pet. App. 15a-16a) According to the Sixth Circuit, the circumstances surrounding the opposition to the project, "raise a genuine issue of material fact as to whether the City, in rejecting the ordinance which approved the site plan, gave effect to the racial bias of its citizens." (Pet. App. 17a) It is also important to note that this was the first and only site plan that the City had ever submitted to referendum. (Pet. App. 15a)

Based on the Ohio Supreme Court's determination that a referendum on an administrative matter violated the Ohio Constitution, *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St. 3d 559, 692 N.E.2d 997, *on rehearing rev'd*, 82 Ohio St. 3d 359 (1998), the Developers were able to construct their apartment complex, after more than a three-year delay that has caused them significant damages.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO ISSUE REQUIRING REVIEW BY THIS COURT

Appellees' Petition for Certiorari should be denied. The Court of Appeals' decision is completely consistent

with existing precedent of this Court, of the Sixth Circuit and of other circuits. The opinion is well-reasoned, clear, and resolves important issues in a fair manner. The City's Petition quarrels with the interpretation of existing precedent, the application of the facts to the law, and the lower courts' interpretation of Ohio law, none of which are proper reasons for consideration by this Court.

The procedural posture of this case is the first sign that it is a case that is not proper for review by this Court at this time. The decision on which review is sought reversed a grant of summary judgment and sent the case back for trial. In reaching the decision that issues of fact precluded summary judgment, the Court of Appeals took into consideration a number of factual circumstances that the City would rather were not examined at all. However, as the Court of Appeals cogently explained, those factual circumstances, when considered in the proper light, support the claims raised by Respondents. Thus, to a great degree, the decision below turned on the application of the law to the facts, the type of decision that is not ordinarily reviewed by this Court, especially when the law in question was accurately stated by the Court of Appeals.

Moreover, the City has failed to show that any of the grounds on which the Court might decide to accept a case for review apply here. Despite Petitioners' attempt to manufacture such grounds, there is no conflict between the decision of the Sixth Circuit in this case and any decision either from this Court or from another circuit. Nor is there even any conflict between the decision of the Sixth Circuit in this case and any of its prior decisions. Of course, even if there were such an intracircuit

conflict, that would not be sufficient ground for granting the petition. *Davis v. United States*, 417 U.S. 333, 340 (1974).

In addition, a true untenable result could come from vacation of the Court of Appeals' decision and affirming the lower court summary judgment, i.e., the setting of a precedent that would allow a City to use a referendum as both a tool to block a housing project likely to be the home of many minorities and families with children, and as a shield from liability for such actions, even though the use of a referendum in such a way is a violation of Ohio's Constitution. If the actions of Cuyahoga Falls in the instant case do not give rise to actionable claims, then municipal governments would be given the message that as long as they do it through a referendum, they are free to violate statutory and constitutional rights.

II. AS CORRECTLY HELD BY THE COURT OF APPEALS, THERE ARE TRIABLE ISSUES OF FACT WITH RESPECT TO DEVELOPERS' EQUAL PROTECTION, DUE PROCESS AND FAIR HOUSING CLAIMS

A. Equal Protection Claims

Petitioners assert that the Sixth Circuit "strayed" from the decision of this Court in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977), which held that an equal protection violation can be found where a government decision maker is motivated by discriminatory motives. Petitioners are mistaken. The Sixth Circuit panel that decided this case did not stray from, but faithfully followed, *Village of*

Arlington Heights. Developers allege that the proponents of the referendum were motivated by racial bias, and that by allowing the referendum to have the effect it did, the City participated in and made manifest this racial discrimination. The Sixth Circuit properly inquired into "such circumstantial and direct evidence of intent as may be available" (Pet. App. 12a, quoting *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. at 266). After consideration of the circumstances surrounding the opposition to Developers' project, circumstances Petitioners choose to ignore, the Sixth Circuit concluded that a genuine issue of material fact existed as to whether City officials, acting on behalf of the City, gave effect to the racial bias of its citizens. (Pet. App. 17a) In reaching this determination, the Court of Appeals recognized the distinction between inquiring into the minds of voters, which it did not do, and considering the evidence as to the motivations of the organizers of the referendum petition drive, which can be considered as evidence of the nature of the opposition to the proposed housing project. (Pet. App. 19a-20a, quoting Judge Bell's opinion, 970 F. Supp. at 1318, Pet. App. 120a-122a) This "sensitive inquiry," mandated by *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, was entirely proper, and was supported by existing precedent and the facts of this case.

As noted by the Court of Appeals, there are a number of cases in which courts found an "equal protection violation where city officials gave effect to the race-based opposition of citizens who sought to block low-income housing from infiltrating their predominately white communities." (Pet. App. 20a). These cases include *United States v. City of Birmingham, Mich.*, 538

F. Supp. 819 (E.D. Mich. 1982), *aff'd*, 727 F.2d 560, 565 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984) (city liable for obstructing a racially integrated housing project in response to the racial animus of a majority of its virtually all-white community).

In this case, it is the motivation of the referendum organizers and the City officials who helped them achieve their goal – at least until the Ohio Supreme Court pronounced the referendum unconstitutional – that is at issue, not the motivation of voters, as in *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986). The act of placing a racially-neutral referendum on the ballot may not be *per se* unlawful (putting aside the illegality under Ohio law of a referendum on an administrative decision). However, if the referendum is used to block construction of housing because of the expectation that the occupants of that housing will include minorities and families with children, then giving effect to the referendum is a violation of both the Fair Housing Act and Equal Protection Clause. *See*, *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981).

While the City contends that its officials had nothing to do with the referendum, and had no choice but to refuse to issue the building permits to the Developers, the facts in the record belie such a conclusion. There is considerable evidence of discriminatory statements and indications of prohibited motivations in the context of the organizing drive to place the issue on the ballot. The connection of Mayor Robart and other city officials supporting and encouraging those who objected to the proposed housing to undertake a referendum campaign to halt the project is evidence to support the Developers' claims. Further, the delay and final refusal to issue the

building permit is evidence that the City officials acted in accord with the discriminatory wishes of certain members of their constituency. Such actions violate the Equal Protection Clause.

It also is important to note that the City's action in certifying the referendum occurred prior to any court case being filed, and before any court decision. Thus, the City's attempt to distinguish *United States v. City of Birmingham, Mich.*, 727 F.2d 560 (6th Cir. 1984) (where the discriminatory motives of citizens were "essentially adopted" by Birmingham city officials) fails. The City exercised discretion when it certified the referendum petition on a basis that was unconstitutional. At the very least, it is a question of fact whether the City had discretion regarding certifying the referendum petition and whether it did so based on discriminatory motives.

B. Fair Housing Claims

Petitioners are correct that the fair housing claim under the disparate treatment theory can be analyzed in the same manner as the equal protection claim. Thus, the arguments above as to the equal protection claim are applicable to the disparate treatment fair housing claim.

Respondents also raised a claim under the Fair Housing Act pursuant to the disparate impact theory. The Court of Appeals' decision on disparate impact under the federal Fair Housing Act does not conflict with other circuit court decisions. The Petitioners' argument that the Sixth Circuit's opinion "plows new legal ground" fails to cite any other circuit court's decision in conflict with it. Instead, the Petitioners rely on the

Sixth Circuit's decision in *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986) and argues that the decision in this case is in conflict with *Arthur*. Even if that were true, such a conflict would not of itself justify this Court's review of the case. Rules of the Supreme Court of the United States, Rule 10(a). *See*, *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

Even more damaging to Petitioner's argument is the reality that *Arthur* did not hold that a disparate impact claim can not be premised on the effect of a facially neutral referendum, as erroneously claimed by Petitioners. (Pet. 15) Instead, *Arthur* held that a referendum *can be* challenged under a disparate impact analysis when the plaintiffs can show "highly unusual circumstances." *Arthur*, 782 F.2d at 575. While the Petitioners argue that the Court of Appeals' opinion makes a "torturous attempt to find an exception to *Arthur*" they really only disagree with its analysis of "highly unusual circumstances" which is a factual dispute and not grounds for granting certiorari in this case.

C. Due Process Claim

The Court of Appeals held that Developers had set forth a valid claim for denial of substantive due process based on the City's use of a referendum to deprive the Developers of the effectiveness of their site plan. Petitioners challenge this holding by arguing that the Court of Appeals ignored its own precedent, *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995); and assert that the holding in this case is in conflict with a decision from another circuit, *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992).

However, Petitioners' argument is meritless, as the Sixth Circuit's decision is consistent with its own precedent as well as with that of other circuits.

Relying on *Triomphe*, the City argues that the developers lacked a property interest. However, the Court of Appeals specifically distinguished *Triomphe* on two grounds, and found other precedent of the Sixth Circuit, *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), to be more apposite. Here, just as in *Nasierowski*, the "plaintiffs' had an affirmative representation that the site plan conformed with the existing zoning regulations as reflected by the City's approval, by ordinance, of the site plan." (Pet. App. 29a) The Appellants' property interest was "securely vested" as of that point. *Id.* This case is *not* concerned with the refusal to grant a special use permit [*Triomphe Investors*] or rezoning land [*Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); also cited by the City]. Here the Developers are challenging a change in the settled expectations they had in the existing zoning code and their compliance with it by submitting an acceptable site plan that was approved by both the Planning Commission and City Council. While the ordinances of the City do grant broad discretion to the planning commission and to City council in considering site plan submissions and require the consideration of many factors, that fact is irrelevant to this claim because those factors had already been considered at the time of the denial of Developers' legitimate expectations.

The Developers had every reason to legitimately expect that in purchasing the property that was zoned for their intended purpose and in working up, at considerable expense, a site plan that then was approved by the

City's own Planning Commission and by City Council, they would be able to proceed to enjoy the benefits of the site plan, be issued the necessary building permits, and construct the planned housing development. To be denied the building permits because of the City's *own* illegal referendum process[2] is precisely the sort of "arbitrary and capricious" action that has been found to violate the right to due process. *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981); and *TLC Development Inc. v. Town of Brandford*, 855 F. Supp. 555 (D. Conn. 1994).

The *Gardner* decision is based on a very different set of facts. The developers in that case sought approval by a Planning Commission of a development plan based on a plat recorded twenty-five years prior. Among the numerous reasons given by the Fourth Circuit for its conclusion that the municipality had discretion to reject the plan was the fact that the old development plan had expired. 969 F.2d at 71. The dissimilarity between that factual situation and the facts of this case, in which the site plan was considered and approved by both the Planning Commission and by City Council and only then subjected to an illegal referendum process, is apparent. There is no conflict.

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[2] It must be noted that the law the City points to as providing a rational basis for its actions and eliminating the discretion of its officials was *its own law*. The law in question was not a law of the federal government, the state or the county; it was the law of Cuyahoga Falls. The City promulgated its own charter that provided for an unlawful referendum on an administrative matter, and the City itself interpreted that charter and acted illegally.

Petitioners' secondary argument is that because it took time for the Ohio Supreme Court to find the City's referendum process unconstitutional, the City's actions during that period could not rise to the level of "arbitrary and capricious." The City essentially argues for a rule that would allow a municipality to deprive citizens of fundamental property or liberty rights simply because the municipality has passed an ordinance or a charter provision permitting that deprivation, despite the fact that the provision in question violates the state constitution. Even putting aside the evidence of discrimination, the City, pursuant to its own devices, unlawfully delayed the Developers in constructing the housing project for which they had an approved site plan. The City cannot claim any rational reason for this conduct as all the factors which it was obligated to consider had already been weighed. This action by the City was arbitrary and capricious and constituted a substantive due process violation.

The Court of Appeals' decision properly concluded that Developers had a vested property right, and that the Respondents presented sufficient evidence to create a genuine issue of material fact as to whether the City, by denying the Developers the benefit of the lawfully approved site plan, engaged in arbitrary, irrational, and therefore unconstitutional application of the law, violating Respondents' right to due process.

III. THE COURT OF APPEALS' DECISION DOES NOT INTERFERE WITH THE FIRST AMENDMENT PROTECTION OF POLITICAL EXPRESSION

The Petitioners attempt to create a constitutional conflict where none exists in arguing that the Court of Appeals' decision infringes on or chills the rights under the First Amendment. This is simply not true. Under the Sixth Circuit opinion, citizens of Cuyahoga Falls have the right to attend meetings, to speak out against the development of a tax credit financed affordable housing, to vote[3] or petition their government for redress to the extent permitted by the Ohio and United States Constitutions. All these activities are protected under the First Amendment even if they are based on the citizens' desire not to have African-Americans or families with children moving into their neighborhood. The First Amendment protects them regardless how hateful their motivations. However, when City officials act on these protests and take discriminatory action, the City is liable for violating rights protected by federal law and the United States Constitution. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

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[3] Respondents are at a loss to understand Petitioners' citation to several Ohio Supreme Court cases which do not conflict with the Sixth Circuit opinion. (Pet. 7) Nor is the citation to *Bonas v. North Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001) which involves an attempt to extend the terms of town council and school committee members in violation of a new Charter amendment helpful in showing some intercircuit conflict necessary to argue for the granting certiorari in the instant case. (Pet. 7) Nowhere in the Court of Appeals' opinion does it prohibit the City from going forward with any referendum.

Unfortunately, not only is racial prejudice extremely likely to be concealed, it is also quite easily disguised. This is because many common land use regulations, generally recognized as serving legitimate environmental and quality-of-life objectives, can be used to create indirectly or directly racial barriers to moving into a community. The federal courts have shown themselves capable of both looking behind catch words, used to conceal racial animus, and examining the sequence of events in determining the motivation of decision makers.

In *Arlington Heights* this Court specifically endorsed this type of direct or circumstantial evidence to prove an invidious discriminatory purpose. Courts may look to the legislative or administrative history, "especially where there are contemporary statements by members of the decision-making body, minutes of its meetings or reports." *Arlington Heights* at 266-67. Nor does it violate the First Amendment to use statements made by citizens at public or private meetings with public officials as evidence to show that the City's action was taken for an unlawful purpose. As this Court explained the First Amendment, "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 481 (1993).

The use of such statements as evidence to assist in determining if a discriminatory purpose was a factor of the disputed conduct has been universally supported by those Courts of Appeals presented with this question. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 428-29 (2d Cir. 1995) (organization formed to keep Orthodox and Hasidic Jews out of community conspired with village to

adopt zoning ordinance); *United States v. City of Birmingham, Mich.*, 727 F.2d 560, 564-65 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984) (opponents of racially integrated low-income housing openly stated bigoted views and opinions and the commission knowingly pursued policies that appeased these views); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066-67 (4th Cir. 1982) (outspoken comments on the part of citizens attending public meetings used to establish invidious motive); and *United States v. City of Black Jack*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). (racist statements made and cheered at public meetings).

While this Court has always shown due deference to the right of the people to directly legislate, it has struck down such conduct when it violates the U.S. Constitution. As this Court has explained, a law adopted by means of the referendum process is not exempted from constitutional scrutiny, since "the sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969). This Court has often struck down the results of elections or referenda that violated the rights of minorities. *See*, *Hunter*, 393 U.S. at 391; *Reitman v. Mulkey*, 393 U.S. 369, 391 (1967); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Romer v. Evans*, 115 S.Ct. 1092 (1995).

The federal civil rights laws and the First Amendment are not at war with each other. This litigation does not involve the "need to preserve the freedom of political expression" as the Petitioners claim. (Pet. 7) Instead, it involves the right to use private property for an already properly zoned public purpose. The Respondent

developers purchased property *already* zoned for multi-family use to construct their apartment complex and this constitutionally protected right *cannot* be sacrificed by a vote of the majority. The Constitution in general, and the Bill of Rights in particular, is the most important guardian of minority rights in a majoritarian political system. As James Madison recognized:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to. . . .

Reitman, 393 U.S. at 391 (Douglas, J., concurring), quoting 5 *Writings of James Madison* 272 (Hunt ed. 1904).

IV. PETITIONERS' STATE LAW ARGUMENTS REGARDING RES JUDICATA ARE NOT PROPER FOR REVIEW BY THIS COURT AND ARE IN ERROR

Petitioners attempt to cloak their state law argument regarding *res judicata* with a cite to *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984), but this question is purely an interpretation of Ohio law that should not call forth consideration by this Court. Moreover, the Court of Appeals was correct in adopting Judge Bell's holding that plaintiffs' suit is not

barred by *res judicata*. *See Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F. Supp. 1289, 1297-1303 (N.D. Ohio 1997) (Pet. App. 69a-83a).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Certiorari.

Respectfully submitted,

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JUN 06 2002

Supreme Court, U.S.
FILED
APR 11 2002
OFFICE OF THE CLERK

No. 01-1269

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART; CITY ENGINEER GERALD DZURILLA, AND CLERK OF COUNCIL GREGG WAGNER,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION; CUYAHOGA HOUSING PARTNERS, INC.; BUCKEYE COMMUNITY THREE L.P.; AND FAIR HOUSING CONTACT SERVICE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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14 pp

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REPLY BRIEF IN SUPPORT OF PETITION

In an attempt to minimize the constitutional importance of this case, Respondents ("Buckeye") claim that the City is simply arguing facts. Such is not the case as the errors of the Court of Appeals are not errors of fact, but rather of constitutional law. In the decision below, a federal court of appeals has held for the first time that a city can be held subject to equal protection liability even though:

1. The government decision-maker is not motivated by racial bias, and

2. The decision-maker's action is required of him by the filing of a referendum petition that is:

   a. Facially neutral,

   b. Supported by justifications other than racial bias, and

   c. Judicially upheld by every level of the state judicial system.

Likewise, for the first time, a court of appeals has held that a facially neutral, judicially upheld, referendum petition can form the basis of a disparate impact claim under the Fair Housing Act.

These are not factual decisions rendered by the court below. Indeed, as properly pointed out by Buckeye, this case was decided on motions for summary judgment precisely because the material facts are not in dispute. Buckeye now attempts to raise factual issues by misstating or manufacturing facts that simply do not exist. Such a tactic should not be permitted to distract this Court from the serious constitutional issues presented here.

The material facts, about which the courts below found no dispute, are as follows:

1. Buckeye purchased property in Cuyahoga Falls and, thereafter, applied to the City for a site plan approval to construct an affordable housing project. (App. 3a) At public hearings, some members of the public expressed opposition in arguably racial terms (App. 15a) Others, however, raised issues that did not involve racial bias. (App. 18a-19a, 47a) The City's Planning Commission and City Council rejected all expressed opposition to the project and approved the site plan. (App. 4a-5a) Mayor Robart also "pocket approved" the project by neither signing nor vetoing the site plan ordinance. (App. 93a) Contrary to Buckeye's new and imaginative assertion at page 2 of its brief, the Mayor's failure to sign the ordinance had no impact on the timing of the effectiveness of the ordinance or the City's ability to issue building permits. (See Judge Bell's analysis concerning the effectiveness of the ordinance at App. 93a-95a)

2. The site plan approval was subject to several conditions that were agreeable to Buckeye. (App. 61a) One of the conditions was that, before building permits could be issued for the apartment complex, Buckeye would build a fence along its property line. (App. 61a, 37a, 42a-43a)

3. The ordinance was scheduled to take effect on May 2, 1996. (App. 94a) After Council passed the site plan ordinance on April 1, 1996, but before it was scheduled to take effect, Buckeye filed an application with the City Engineer for building permits for its project. (App. 37a) However, Buckeye did not build the fence that was a prerequisite to the issuance of building permits. (*Id.*) Thus, building permits were withheld until such time as the site plan ordinance took effect and Buckeye built the required fence.

4. On April 29, 1996, before the ordinance could take effect, residents of the City filed a referendum petition, which stayed the effectiveness of the ordinance pursuant to the City's charter. (App. 94a-95a) Contrary to Buckeye's claim at page 10, footnote 2 of its brief, the City Charter provision, which stayed the effectiveness of the site plan ordinance, is fully consistent with and, in fact, modeled after Ohio constitutional and statutory law. (App. 94a, n. 19; Ohio Constitution, Article II, Section 1c; O.R.C. 731.29)

5. "It is undisputed that the referendum in this case was facially neutral and that there were other hypothetical justifications for the referendum apart from racial bias." (Court of Appeals opinion at App. 18a-19a)

6. The City Engineer sought legal advice from the City's Law Director who advised that, due to the filing of the referendum, building permits could not be issued until the efficacy of the ordinance was determined. (App. 44a) The Engineer withheld permits based on this advice. (*Id.*) Mayor Robart, despite his personal opposition to the project, had no role in the decision to withhold building permits. (App. 49a-50a) Thus, any opposition to the project expressed by him was ineffective and, therefore, irrelevant. (*Id.*)

7. Until July 16, 1998, when the Ohio Supreme Court issued its final judgment, all three levels of Ohio courts upheld the validity of the referendum petition. (App. 255a, 246a, 214a)

8. There is no evidence that the City Engineer, in withholding permits, was motivated by racial animus. (App. 48a)

A. Equal Protection and Fair Housing Act

1. Intentional Discrimination Claim

The case of *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) permits an equal protection cause of action where *government decision-makers* are motivated by an intent to racially discriminate. In Cuyahoga Falls, the decision to issue or withhold building permits rests with the City Engineer. Judge Polster properly inquired into the Engineer's motivation and found no evidence of discriminatory intent on his part. (App. p., 48a.) Buckeye could likewise present no evidence of such discriminatory intent. Thus, it argued, as it does now, that the Court should have examined the political expressions of a handful of citizens to find a racial motivation it could then impute to the City Engineer.

Buckeye justifies such an analysis as being part of the "sensitive inquiry" into intent required by *Arlington Heights*. However, Buckeye fails to distinguish between the intent of the *decision-maker* who withheld building permits and the motivations of a myriad of diverse citizens who merely signed a referendum petition. *Arlington Heights* permits examination of the former, but not the latter. See also *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986).

In *James v. Valtierra*, 402 U.S. 137 (1971), this Court recognized that the valid and proper actions of the people must be honored despite the possibility that those actions may be supported by persons whose political views are less than appealing. For this reason, the court in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, (7th Cir 1977) (*Arlington II*), warned at page 1292 that, "the bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a

legitimate basis." The Court below specifically found that the instant referendum had a legitimate basis, being justified by concerns other than racial bias. (App. 19a) Yet, it held that the City could be held liable for the arguably racial comments of a literal handful of individuals. (App. 15a) Such a holding will negate *any* referendum on public housing, for "proponents of the project could always introduce race as an issue in the referendum election" thereby subjecting the election to an equal protection challenge. *Arthur v. Toledo*, *supra*, at 574.

For this reason, and after fully analyzing this Court's prior decisions concerning referenda, the *Arthur* court concluded at 782 F.2d 565, that "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context."

The *Arthur* holding is sound and must be adopted by this Court in order to prevent the aberration of the decision below. The Court below justified its holding by stating it was not overturning the *result* of the referendum. While this is true, it did something far worse; it overturned the referendum *process* itself, by permitting liability for the mere *filing* of a referendum petition. This holding is contrary to the sentiments expressed in *James*. See also *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).

2. Disparate Impact Claim

Buckeye's response concerning its disparate impact claim is less than helpful. It criticizes the City for relying only upon cases from the Sixth Circuit. *Arthur*, *supra*; *Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994). However, Buckeye has cited *no* case in which the filing of a referendum

petition was found to support a disparate impact claim. The City has likewise been unable to find one. The earlier decisions of the Sixth Circuit in *Arthur* and *Clarke* are well reasoned with ample support for the rejection of such a cause of action. As this Court has never ruled on this issue, it is fitting that it do so now.

B. Due Process

In an attempt to bolster its due process argument, Buckeye states at page 1 of its brief that the "Developers complied with all site plan and zoning requirements, as well as with additional requirements imposed on them by the City." This statement is patently false.

As noted above, the site plan approval required Buckeye to construct a fence along its property line before receiving building permits for the apartments. (App. 37a, 42a-43a.) It did not do so, which in itself provided a rational basis for the withholding of building permits. (App. 42a)

Buckeye claims at pages 8 and 9 of its brief that the City's approval of the site plan gave it a legitimate expectation to building permits. However, the approval of the site plan was but one of many prerequisites to the issuance of building permits. *All* lawful requirements had to be fulfilled before Buckeye could claim a "legitimate expectation" to permits. See *Board of Regents v. Roth*, 408 U.S. 564. Furthermore, as long as Buckeye failed to comply with these requirements, the decision to withhold building permits cannot be said to have been "arbitrary and capricious." *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992).

The Court of Appeals, relying upon *Bannum v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), erroneously excused Buckeye from the requirement to build the fence stating it would have been a "futile act" in light of the

referendum. (App. 28a, n 5) However, *Bannum* was an equal protection case, not a due process case, and dealt with the doctrine of finality. That doctrine remains intact in the due process context. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

Buckeye complains that the referendum petition violated the Ohio Constitution. However, as properly found by Judge Polster, that was not decided for several years after Buckeye first applied for building permits. During the intervening time, the Ohio courts, including its Supreme Court, upheld the constitutionality of the referendum petition. Thus, "there was no time (until the Supreme Court reversed itself in July 1998) during which the City had any legal authority to issue a permit to the Developers." (App. 42a.) It cannot be a due process violation for the City to withhold what it has no authority to give.

Buckeye's reliance upon *Nasierowski Brothers Investment Co. v. Sterling Heights*, 949 F.2d 890 (6th Cir., 1991) is misplaced. In that case, the developer purchased property in reliance upon the city's specific representation that the proposed use was lawful. In the instant case, Buckeye took no detrimental action in reliance upon any representation of entitlement to building permits. Unlike the developer in *Nasierowski*, Buckeye purchased its property on June 12, 1995, long before applying for building permits in April, 1996. (App. 3a) Buckeye can, therefore, claim no detrimental reliance upon any expectation of entitlement to permits.

Because Buckeye had no legitimately held property interest in the receipt of building permits and because the City's withholding of such permits had several rational bases in law, it was an error of law for the Court of Appeals to allow Buckeye to maintain its due process challenge. *Board*

of Regents v. Roth, *supra*; *Williamson Planning Comm'n v. Hamilton Bank*, *supra*; *Pearson v. Grand Blanc*, *supra*.

C. *Res Judicata*

Buckeye's single-paragraph argument on *res judicata* misses the point. The error of Judge Bell and the Court of Appeals is not that they misinterpreted Ohio law; rather, they improperly *created* Ohio law contrary to *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984).

Ohio does not permit successive actions arising out of a single factual transaction. *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995). An exception to this rule is where the first lawsuit sought nothing more than a declaratory judgment. *Jamestown Village Condo. Owners Assoc. v. Market Media Research*, 96 Ohio App. 3d 678 (1994); Restatement of Judgments 2d, Section 33. Such is not the case here where Buckeye's initial state action sought declaratory *and* injunctive relief. By extending the *Jamestown* exception to this case, Judge Bell and the Court of Appeals improperly created new law for the State of Ohio, thereby violating 28 U.S.C. 1738 and *Migra*, *supra*. See also *Allen v. McCurry*, 449 U.S. 90, (1980).

D. First Amendment Rights

Buckeye claims that its position does not jeopardize the rights to assemble, speak freely, and petition the government. In fact, Buckeye claims to recognize that people have the right to express themselves, but then goes on to state that such expression can be the basis of civil rights liability. Buckeye brief, pp. 12-13. In the referendum context, however, such cannot be allowed because of the heterogeneous nature of popular elections.

Certainly, the courts can look to the comments of a government decision-maker to determine that person's motives. *Arlington Heights*, *supra*. However, in the referendum context, the people do not speak with one voice, nor do they act with one motive. In this case, over 4,300 people signed a facially neutral petition that the Court of Appeals recognized was supported by justifications other than racial bias. Thus, the political action of those 4,300 people is constitutionally protected under any theory. *Meyer v. Grant*, 486 U.S. 414 (1988). Yet, Buckeye would invalidate this lawful activity and hold the City financially liable because of the arguably racial comments of a handful of individuals. Thus, Buckeye wholly subscribes to the warning of *Arthur* at 782 F.2d 574 that liability can be found if only one citizen testifies that racial considerations motivated him to sign the petition. Buckeye's position indeed jeopardizes the first amendment rights of the people as it subjects the legitimate actions of the people and their government to liability for the radical views expressed by one person.

CONCLUSION

While this Court has decided many referendum cases, it has never held on the issues currently before it, specifically, whether a district court may inquire into the motivations of referendum petitioners to find a basis for intentional discrimination on the part of government decision-makers. It has also never before decided whether a facially neutral referendum petition can form the basis of a disparate impact claim under the Fair Housing Act.

Also unique to this case is the question whether a City can be held liable for civil rights violations when its acts are in complete obedience to valid court decisions. Of course, those prior court decisions also raise the federal question of whether

the federal courts must give them full faith and credit under 28 U.S.C. 1738.

Despite Buckeye's protestations to the contrary, this case presents many issues requiring this Court's studied attention. For the reasons expressed herein, along with those presented in its original petition, the City respectfully requests this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

Virgil Arrington Jr.
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City of Cuyahoga Falls
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Supreme Court, U.S.
FILED
JUN 4 2002
OFFICE OF THE CLERK

(16)

No. 01-1269

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART; CITY ENGINEER GERALD DZURILLA, AND CLERK OF COUNCIL GREGG WAGNER,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION; CUYAHOGA HOUSING PARTNERS, INC.; BUCKEYE COMMUNITY THREE L.P.; AND FAIR HOUSING CONTACT SERVICE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL AUTHORITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

On page 17 of the City's Petition for Writ of Certiorari, the City stated that the Ohio Supreme Court had never addressed the declaratory judgment exception to the doctrine of *res judicata*. Under that exception, a case that seeks *solely* declaratory relief does not bar a subsequent action seeking coercive relief. Since the City submitted its petition, the Ohio court has considered and adopted the exception.

In *State ex rel. Shemo v. Mayfield Heights*, 95 Ohio St.3d 59 (2002), decided April 10, 2002, the Ohio Supreme Court adopted the declaratory judgment exception, relying upon *Jamestown Village Condo. Owners Assn. v. Market Media Research, Inc.*, 96 Ohio App. 3d 678 (1994), and Section 33, Comment c of the Restatement of Judgments 2d. By citing these authorities with approval, the Ohio Supreme Court impliedly approved the limitations upon the exception set forth therein, *i.e.*, that the declaratory judgment exception applies only where the first case sought *solely* declaratory relief.

Since Buckeye's state case sought both declaratory and coercive relief, the doctrine of *res judicata* remains a bar to the instant federal action. 28 U.S.C. 1738.

Respectfully submitted,

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(14)

Supreme Court, U.S.
FILED
SEP 6 2002
OFFICE OF THE CLERK

No. 01-1269

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART; CITY ENGINEER GERALD DZURILLA, AND CLERK OF COUNCIL GREGG WAGNER,
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed February 26, 2002
Petition for Certiorari Granted June 24, 2002

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CIVIL DOCKET FOR CASE #: 96-CV-1458

1	7/5/96	COMPLAINT (Service: summons, magistrate consent form issd) (13 pgs) (jam) [Entry date 07/09/96]
15	7/26/96	ANSWER to Complaint by dfts City of Cuyahoga Falls, Don Robart, Gregg Wagner & Gerald M Dzurilla. (4 pgs) (ja) [Entry date 07/29/96]
32	10/15/96	MOTION by dfts Cuyahoga Falls City, Don Robart, Gregg Wagner & Gerald M Dzurilla for summary judgment w/memo & affdt. (88 pgs) (ja)
33	10/15/96	EXHIBITS by dfts Cuyahoga Falls City, Don Robart, Gregg Wagner & Gerald M Dzurilla in supp of dfts' mot for SJ. (174 pgs) (ja)
48	11/5/96	DEPOSITION of Frank Pribonic taken on the following date (s): 8/30/96 at 1:30 p.m. Fees: none. (91 pgs) (ja)
50	11/7/96	MEMORANDUM by plas in opposition to dfts City of Cuyahoga falls, Don Robert (in his official capacity), Gregg Wagner &

		Gerald Dzurilla (in their official capacity) mot for summary judgment [32-1]. (66 pgs) (tl)
51	11/7/96	REPLY by dfts Cuyahoga Falls City, Don Robart (in his official capacity), Gregg Wagner, Gerald M Dzurilla to response of plas to dfts' motion for summary judgment [32-1]. (26 pgs) (tl)
56	11/14/96	MOTION (copy) by pltfs for preliminary inj re: referendum on repealing ordinance #48-1996 (3 pgs (js) [Edit date 11/14/96]
57	11/14/96	MEMORANDUM by plaintiffs in support of motion for preliminary inj [56-1] w/exh. (79 pgs) (ja) [Entry date 11/15/96]
68	11/22/96	STIPULATION and jointly agreed upon prel inj ord that dft Summit Cty Bd of Elections is barred, stayed & prevented from certifying the results of the recently held 11/5/96 vote on the referendum re: City of Cuyahoga Falls Ordinance 48-1996 [56-1]; this ord shall remain in full force & effect until further ntc of its modification or dissolution. (issued on 11/25/96) (2 pgs) Judge Sam H. Bell (ja) [Entry date 11/25/96]

70	12/6/96	TRANSCRIPT of proceedings of Prel Inj before Judge Sam H. Bell taken on 11/19/96 at 8:30 a.m. by court reporter Richard DelMonico. (198 pgs) (ja)
71	12/6/96	TRANSCRIPT of proceedings of Prel Inj before Judge Sam H. Bell taken on 11/20/96 at 1:15 p.m. by court reporter Richard DelMonico. (140 pgs) (ja)
72	12/6/96	TRANSCRIPT of proceedings of Prel Inj before Judge Sam H. Bell taken on 11/21/96 at 8:30 a.m. by court reporter Richard DelMonico. (80 pgs) (ja)
73	12/9/96	BRIEF by dfts City of Cuyahoga Falls, Don Robart, Gregg Wagner & Gerald M Dzurilla in opposition to motion for preliminary inj [56-1] w/afdt. (18pgs) (ja)
78	12/13/96	ORDER denying plas' motion for preliminary inj [56-1]. (issued on 12/13/96) (9 pgs) Judge Sam H. Bell (ja)
86	2/14/97	REPORT AND RECOMMENDATION that dfts mots for SJ should be granted and this case should be dismissed in its

entirety; fur it is important to note that the recommended decision embodied here does not represent any judgment on the dfts actions on the merits or the referendum. The record clearly conveys the emotional nature of the issues raised by the proposed development. The undersigned, however, has evaluated the legal issues presented in this case detached from the emotion reflected in the record. [34-1], [32-1] (issued on 2/14/96) (58 pgs) Mag. Judge James D. Thomas (sh) Appears in Petitioner's Appendix at 132a.

101	6/20/97	ORDER granting dft Robart's motion for summary judgment [34-1] insofar as it challenges plas' non-race-based equal protection claim; second because dft Robart is entitled to qualified immunity plas may not proceed against him in his individual capacity; further, Mayor's mot for SJ is granted; further, as for balance of dfts' mot Ct finds that plas have provided evidence which, if viewed in their favor, could demonstrate claims founded in due process as well as claims based upon plas' right to

the equal protection of the laws; further, this ord does not contemplate whether plas will ultimately succeed in their claims rather it merely states that plas should be afforded a tr at which they could fairly pursue them. (issued on 6/20/97) (64 pgs) Judge Sam H. Bell (ja) [Entry date 06/23/97] Appears in Petitioner's Appendix at 55a.

105	8/28/97	TRIAL ORDER: Track Designation: standard. Discovery to be complete 2/5/98; disp mots due 3/5/98; resps due 3/25/98 & replies 4/6/98; pretrial conference w/counsel & clients in personal attendance at 1:30 p.m. on 6/22/98; bench trial at 8:00 a.m. on 6/30/98 on 2-wk standby. (issued on 8/28/97) (12 pgs) Judge Sam H. Bell (ja)
115	10/23/97	FIRST AMENDED & SUPPLEMENTAL COMPLAINT by pltfs [1-1] (adding Ohio Capital Corporation for Housing, D E Weatherby & Associates, & J J O Construction Co as new pty pltfs & adding Ohio Dept of Development Ohio Housing Finance Agency, & Tim Davis as new pty nominal

		defts) (no summons provided for issuance) (17 pgs) (jam) [Entry date 10/24/97]
116	10/27/97	ANSWER to 1st Amended Complaint by dfts City of Cuyahoga Falls, Don Robart, Gregg Wagner & Gerald M Dzurilla; jury demand. (4 pgs) (fm)
143	4/2/98	MOTION by pltf Developers for partial SJ (65 pgs) (jam) [Entry date 04/03/98]
145	4/22/98	ANSWER BRF by defendants in opposition to plas' motion for partial SJ [143-1] w/exh. (32 pgs) (ja)
146	5/4/98	REPLY BRIEF in support by pltfs to defts' resp to pltfs' motion for partial SJ [143-1]. (17 pgs) (kv)
151	6/5/98	MOTION by defts City of Cuyahoga Falls, Robart, Wagner and Dzurilla for SJ (21 pgs + 19 exh pgs) (jma)
153	6/17/98	MOTION by pltfs to file brf in excess of 20 pgs instanter (Reply attached) (attach & 1 pg) (jam)

154	6/22/98	REPLY by dfts Cuyahoga Falls City, Don Robart, Gregg Wagner, Gerald M Dzurilla to pla's resp to mot by defts City of Cuyahoga Falls, Robart, Wagner and Dzurilla for SJ [151-1] (44 pgs) (rtp)
172	8/14/98	SUPPLEMENTAL brief by defts Cuyahoga Falls City, Don Robart, Gregg Wagner, and Gerald M Dzurilla in support of their motion for SJ [151-1] (18 pgs) (jma)
173	8/14/98	SUPPLEMENTAL Brf by Developer pltfs in supp of their mtn for partial SJ [143-1] (121 pgs) (jam)
174	8/14/98	SUPPLEMENTAL Reply Brf by pltfs to defts' mtn for SJ [151-1], [34-1], [32-1] (70 pgs) (jam) [Entry date 08/25/98]
175	9/8/98	SUPPLEMENTAL brf in opp by defts Cuyahoga Falls City, Don Robart, Gregg Wagner and Gerald M Dzurilla to motion by pltf Developers for partial SJ [143-1] (14 pgs + 32 exh pgs) (jma)
195	11/29/99	MEMORANDUM, OPINION, AND ORDER: granting motion by defts

City of Cuyahoga Falls, Robart, Wagner and Dzurilla for SJ [151-1] on all counts of the complaint (issued on 11/29/99) (17 pgs) Judge Dan A. Polster [EOD Date: 11/29/99] (jma) Appears at Petitioner's Appendix at 35a.

196 11/29/99 JUDGMENT: Court having filed memorandum and opinion entering jgm for defts on all counts of complaint and dismissing case, as final (issued on 11/29/99) (1 pg) Judge Dan A. Polster [EOD Date: 11/29/99] (jma)

197 12/21/99 NOTICE of Appeal by all pltfs re: memo, opn and order [195-1] & re: jgm entry [196-2] (cc: all counsel-notice only. USCA- notice and doc(s) mailed on 12/27/99) (20 pgs) (shh) [Edit date 12/27/99]

USCA6 DOCKET SHEET FOR 99-4555 AND 00-3052

8/31/01 OPINION filed: REVERSED; decision for publication pursuant to local rule 206 [99-4555, 00-3052]. Nathaniel R. Jones, Authoring Judge, Martha C. Daughtrey, Circuit Judge, R. G. Cole, Circuit Judge. (tmb) [00-3052 99-4555]

Appears at Petitioner's Appendix 1a.

8/31/01 JUDGMENT: REVERSED. (tmb) [00-3052 99-4555]

9/13/01 PETITION for en banc rehearing filed by Virgil E. Arrington for Appellees Cross-Appellants Gerald M. Dzurilla, Gregg Wagner, Don Robart, Cuyahoga Falls. Certificate of service date 9/11/01. [99-4555, 00-3052] (blh) [00-3052 99-4555]

12/4/01 ORDER filed denying petition for en banc rehearing [2422872-1] filed by Virgil E. Arrington [99-4555, 00-3052]. Nathaniel R. Jones, Martha C. Daughtrey, R. G. Cole, Circuit Judges. (blh) [00-3052 99-4555] Appears at Petitioner's Appendix 192a.

[The Following Affidavit Appears as an Attachment to the City's Initial Motion for Summary Judgment in the District Court Record at Document No. 32]

AFFIDAVIT OF GREGG WAGNER

I, Gregg Wagner, being first duly sworn and cautioned, do hereby state as follows:

1. I have personal knowledge of the matters contained herein.

2. I am, and have been at all relevant times, the Clerk of Council for the City of Cuyahoga Falls.

3. On February 29, 1996, legislation was introduced to City Council to approve the site plan for a 72 unit apartment complex on Pleasant Meadow Blvd. This legislation was assigned Temporary Ordinance No. A-39.

4. On April 1, 1996, City Council passed temporary ordinance A-39. This ordinance received the permanent designation of Ordinance 48-1996. Council's vote on Ordinance 48-1996 was six in favor, three opposed and two abstentions. Mayor Robart neither signed nor vetoed the ordinance.

5. On April 29, 1996, electors of the City submitted a referendum petition to me seeking to place Ordinance 48-1996 on the ballot in November, 1996. I submitted this petition to the Board of Elections for the evaluation of the validity of the signatures. On May 1, 1996, the Board of Elections returned the petition to me and indicated that there were sufficient valid signatures on the petition.

6. On May 28, 1996, City Council reconsidered Ordinance 48-1996 and it passed by the same vote as on April 1, 1996. Upon the failure of City Council to repeal the ordinance, I resubmitted the petition to the Board of Elections for placement of the issue on the ballot on November 5, 1996.

7. At all times, I acted in with the intent to comply with the law and the Cuyahoga Falls Charter and without any discriminatory intent.

8. Attached hereto are true and accurate copies of the following documents:

Exhibit A: The Cuyahoga Falls Charter

Exhibit B: Cuyahoga Falls Ord. 48-1996

Exhibit C: Cuyahoga Falls Ord. 77-1991

Exhibit D: Cuyahoga Falls Codified Ord. 1128.08

Exhibit E: Cuyahoga Falls Codified Ord. 1144.03

FURTHER AFFIANT SAYETH NAUGHT

s/ _____
Gregg Wagner

The foregoing was sworn to and subscribed in my presence by Gregg Wagner this 11th day of October, 1996.

s/ _____
Sharon Sands
Notary Public
My commission expires March 26, 1998

[The Following Are Selected Portions of the Cuyahoga Falls Charter Which Appears as an Attachment to the City's Initial Motion for Summary Judgment in the District Court Record at Document No. 32]

SELECTED PORTIONS OF THE CHARTER OF THE CITY OF CUYAHOGA FALLS

* * *

ARTICLE II
MAYOR

* * *

SECTION 5. MAYOR'S VETO.

An ordinance or resolution passed by the Council shall be signed by the President of Council or other presiding officer of Council and presented forthwith to the Mayor by the Council Clerk. If the Mayor approves such ordinance or resolution, he shall sign it within ten (10) days after its passage or adoption by the Council, but if he does not approve it, he shall return it to the Council with his objections within said ten (10) days, or if the Council be not then in session, at the next regular meeting thereof, which objections the Council shall cause to be entered in full on its journal. If the Mayor does not sign or so return an ordinance or resolution after its passage or adoption, within the time specified, it shall take effect in the same manner as if he had signed it. The Mayor may approve or disapprove the whole of any item or part of any item or

part of any ordinance or resolution appropriating money. When the Mayor refuses to sign an ordinance or resolution or part thereof and returns it to the Council with his objections, the Council may, prior to the expiration of not more than fourteen (14) days, from the date of its return, proceed to reconsider it, and, if upon reconsideration the resolution or ordinance or part or item thereof disapproved by the Mayor be approved by the vote of two-thirds (2/3) of all members of Council, it shall take effect without the signature of the Mayor in the same manner as if he had signed it. In all such cases, the votes shall be taken by "yeas" and "nays" and entered individually on the journal.

* * *

ARTICLE VIII
ZONING AND PLANNING
SECTION 1. PLANNING COMMISSION.
SECTION 1.7 SUBMISSION OF DECISION TO COUNCIL.

All plans, recommendations, regulations and decisions made by the Planning Commission which result in approval of requests, shall be submitted to and approved by Council before the same shall be considered as official. All decisions made by the Planning Commission, except those rendered under the authority of Section 1.9, Mandatory Referrals, and which decisions deny the request made in the application, may be appealed to Council according to procedures heretofore or hereafter established by the

Council of the City of Cuyahoga Falls. Any request disapproved by formal action of the Planning Commission under any authority granted by this Charter or ordinance and subsequently appealed to Council, shall require a two-thirds vote of all members elected or appointed to the Council for adoption or authorization. A vote of less than two-thirds shall be considered an affirmation of Planning Commission action. (Amended 11-2-65.)

* * *

ARTICLE IX
INITIATIVE, REFERENDUM, RECALL

* * *

SECTION 2. REFERENDUM.

The electors shall have the power to approve or reject at the polls any ordinance or resolution passed by the Council, except as hereinafter provided. Only electors of the City may circulate referendum petitions. Within thirty (30) days after the passage by the Council of such ordinance or resolution or its repassage over the Mayor's veto, whichever is later, a petition signed by at least ten percent (10%) of the electors of the City may be filed with the Clerk of the Council, requesting that such ordinance or resolution be either repealed or submitted to a vote of the electors. If said petition is signed by twenty percent (20%) or more of such time of filing thereof. When such petition is filed, the Clerk shall first ascertain the sufficiency of the petition, and if found sufficient, the Council shall thereupon, within thirty (30) days of the

filing of such petition, reconsider such ordinance or resolution. If upon such reconsideration the ordinance or resolution is not repealed, the Council shall provide for submitting it to a vote of the electors on the date so fixed, or, if not so fixed, at the first general election in any year occurring more than ninety (90) days from the filing of such petition. No such ordinance or resolution shall go into effect until approved by a majority of those voting thereon, in which event such ordinance or resolution shall go into effect on the fifth day after the day on which the Board of Elections certifies the official vote thereon. When the Council by general law or under provisions of general ordinance is required to pass more than one ordinance or resolution necessary to make and pay for any public improvement, the referendum provision shall apply only to the first ordinance or resolution required to be passed and not to any subsequent ordinances or resolution relating thereto. In addition, ordinances providing for an annual tax levy or for improvements petitioned for by the owners of a majority of the foot front of the property benefitted and to be specially assessed therefor, and appropriation ordinances limited to the subject of appropriations shall not be subject to referendum, but, except as herein provided, all other ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, including emergency ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, shall be subject to referendum, except that such emergency ordinances and resolutions shall go into effect at the time

indicated therein. If, when submitted to a vote of the electors, an emergency measure be not approved by a majority of those voting thereon, it shall be considered repealed as regards any further action thereunder; but such measure shall be deemed sufficient authority for payment, in accordance therewith, of any expense incurred previous to the referendum vote thereon. s

Ordinances or resolutions submitted to the Council by initiative petition and passed by the Council either with or without change, but not submitted to a vote of the electors shall be subject to referendum in the same manner as other ordinances or resolutions. (Amended 11-4-80.)

[The Following Ordinances Appear as an Attachment to the City's Initial Motion for Summary Judgment in the District Court Record at Document No. 32]

CITY OF CUYAHOGA FALLS
ORDINANCE NO. 48-1996

AUTHORIZING AND APPROVING THE PLAN FOR DEVELOPMENT OF A 72 UNIT APARTMENT COMPLEX IN THE 300 BLOCK OF PLEASANT MEADOW BOULEVARD IN AN R-17 MEDIUM DENSITY MULTIPLE FAMILY ZONING DISTRICT AND DECLARING AN EMERGENCY.

WHEREAS, the Charter of the City of Cuyahoga Falls requires that all decisions made by the Planning Commission be submitted to Council, and

WHEREAS, a site plan review by the Planning Commission is required for this development of land located in an R-17 Medium Density Multiple Family zoning district within the City of Cuyahoga Falls, Ohio, and

WHEREAS, on February 21, 1996, the Planning Commission approved the site plan for development of a 72 unit apartment complex in the 300 block of Pleasant Meadow Boulevard within the City of Cuyahoga Falls, Ohio.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Cuyahoga Falls, County of Summit, and State of Ohio:

SECTION 1. That this City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-6-96-SP.

SECTION 2. That any other ordinances or resolutions or portions of ordinances and resolutions inconsistent herewith be the same are hereby repealed, but any ordinances and resolutions not inconsistent herewith and which have not previously repealed are hereby ratified and confirmed.

SECTION 3. That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and of any committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements ding Section 121.22 of the Ohio Revised Code.

SECTION 4. That this ordinance is hereby declared to be an emergency measure necessary for the preservation of the public peace, health, safety, convenience and welfare of the City of Cuyahoga Falls and the inhabitants thereof, for the reason it is immediately necessary to permit timely and appropriate development of this property, and

provided it receives the affirmative vote of two thirds of the members elected or appointed to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force at the earliest period allowed by law.

Passed: 4/1/96 s/ _____
President of Council

Approved: _____ s/ _____
Clerk of Council

_____
Mayor

CITY OF CUYAHOGA FALLS
ORDINANCE NO. 1128.08
SITE PLAN APPROVAL

A development containing three or more buildings or in excess of eight units shall be permitted only after the review and approval of the site plans by the Planning Commission in accordance with Chapter 1144. In addition to the provisions of Chapter 1144, the Commission shall be guided by the intent and purpose of the R-17 District in making its judgment of the site plans.

(Ord. 190-1974. Passed 7-22-74.)

CITY OF CUYAHOGA FALLS
ORDINANCE CHAPTER 1144
Site Plan Review Regulations

1144.01 PURPOSE.

The purpose of this chapter is to provide adequate review by the Planning Commission of proposed development in those zoning districts where the uses permitted are of such a nature because of their size, scale or effect on surrounding property, that review of specific plans is deemed necessary to protect the public health, safety and general welfare of the community. (Ord. 190-1974. Passed 7-22-74.)

1144.02 APPLICATION.

In addition to submitting the plans and other data required by the Building Department, an applicant for a building permit in any district requiring site plan approval shall submit a plan of development to the Planning Commission as set forth in Section 1144.03.

(Ord. 190-1974. Passed 7-22-74.)

1144.03 SITE PLAN REQUIREMENTS.

No building permit or certificate of occupancy shall be issued for the construction or any use of any building in such district except in accordance with a plan of development approved by the Planning Commission. Such plan of development shall show in addition to the information required by the Building Department the location and height of all buildings and structures, the area devoted to parking facilities and accessory buildings, all access roads and drives, the topography and major vegetation features now

existing on the land, the proposed grading, landscaping and screening plans, green area and such other features necessary for the evaluation of the development plan.

(Ord. 190-1974. Passed 7-22-74.)

1144.04 PLANNING COMMISSION CONSIDERATION.

The Commission shall consider the location of buildings, parking areas and other features with respect to the topography of the lot, existing natural features such as streams and large trees, the efficiency, adequacy and safety of the proposed layout of internal streets and driveways, the location of the green area provided, bearing in mind the possible effects of irregularly shaped lots, the adequacy, location, landscaping and screening of the parking lots and such other matters as the Commission may find to have a material bearing upon the stated standards and objectives of the various district regulations.

If the Commission finds that a proposed plan of development does not meet the purposes of this Zoning Ordinance, it shall disapprove the plan and shall submits its findings in writing, together with the reasons therefor, to the applicant, within sixty days after having received the site plan. If no action has been taken by the Commission within such time, then such plan shall be deemed to have been approved; provided, however, that the applicant may waive this time limit and consent to the extension of such period, in which event he shall give notice of the waiver to the Planning Commission.

(Ord. 190-1974. Passed 7-22-74.)

1144.05 APPROVAL OF SITE PLAN.

A plan of development shall remain valid for a period of twenty-four months following the date of its approval. If at the end of that time, construction shall not have begun, then such plan of development shall be considered as having lapsed and shall be of no effect unless resubmitted to the Commission and reapproved. All construction and development under any building permit shall be in accordance with the approved site development plan. Any departure from such plan shall be cause for revocation of a building permit or denial of an occupancy permit. Any changes in an approved plan shall be resubmitted for approval in accordance with this section. Construction shall be deemed to have begun when all necessary excavations and piers or footings of one or more principal buildings included in the development plan shall have been completed.

(Ord. 190-1974. Passed 7-22-74.)

[The Following Affidavit Appears as an Attachment to the City's Initial Motion for Summary Judgment in the District Court Record at Document No. 32.]

AFFIDAVIT OF LOUIS SHARPE

I, Louis Sharpe, being first duly sworn and cautioned, do hereby state as follows:

1. I have personal knowledge of the matters contained herein.

2. I am, and have been at all relevant times, the Planning Director for the City of Cuyahoga Falls. My duties as Planning Director include the presentation of staff summaries to the Planning Commission for the review of site plans.

3. On January 29, 1996, Buckeye Community Three, L. P. (Buckeye) filed an application for site plan review with the Planning Commission for a proposed 72 unit apartment complex to be built on Pleasant Meadow Blvd. in the City of Cuyahoga Falls. The land on which the apartment complex was proposed for development is zoned R-17, a multi-family residential classification.

4. I prepared a staff summary with a recommendation for the Planning Commission with respect to Buckeye's project. Attached hereto as Exhibit A is a true and accurate copy of my Staff Summary.

5. Buckeye's site plan was reviewed by the Cuyahoga Falls Planning Commission on February 21, 1996. Steven Boone attended this meeting on behalf of

Buckeye. At the meeting, I presented my Staff Summary (Exhibit A hereto) and orally read its nine stipulations. Mr. Boone voiced no objection to the nine stipulations.

6. The Planning Commission approved the site plan subject to the nine stipulations recommended by me. Attached hereto as Exhibit B is a true and accurate copy of the amended minutes of the February 21, 1996, meeting of the Planning Commission.

7. As of the date of this affidavit, the fence required by stipulation number 8 of my staff summary which was adopted by the Planning Commission and City Council has not been constructed on the site of the proposed Pleasant Meadow Blvd. apartment complex.

FURTHER AFFIANT SAYETH NAUGHT

/s/ _____
Louis Sharpe

The foregoing was sworn to and subscribed in my presence by Louis Sharpe this 12th day of October, 1996.

/s/ _____
Notary Public

My Commission expires never (Atty).

Cuyahoga Falls Planning Commission
23 l0 Second Street
Cuyahoga Falls, Ohio 44221
216/971-8142 or FAX 216/971-8168

STAFF SUMMARY

File P-6-96-SP:

SITE PLAN REVIEW - Request to construct 72 apt. units in eleven buildings on 6.29 acres of land at a density of 11.44 units per acre on the south side of Pleasant Meadow Blvd. Located in an R-17 Medium Density Multiple Family Zoning District. Buckeye Community Three Ltd. Partnership*, owner. D.E. Weatherby & Assoc., Inc., agt.

BACKGROUND

This site is also known as the 300 block of Pleasant Meadow Boulevard. The property was zoned R-3 Residential Multi-Family Zoning in the former Northampton Township and upon merger entered the City of Cuyahoga Falls zoned R.-17 Medium Density Multiple Family in accordance with the Merger Agreement. At the time of merger, the site was vacant and fronted on an unimproved Summit County utility easement that served as an access road for several apartment/condominium units on the north side of the easement. Through a process involving street dedications, private construction of a public street and the 1989 Pleasant Meadow Apartments Subdivision.

Pleasant Meadow Boulevard was dedicated and fully improved to its current terminus approximately 1,500 feet west of Wyoga Lake Road. In December of 1989, the site in question was approved for the

construction of 92 townhouse units. The project, however, was never completed and the property sold in 1995 to Buckeye Community Three Ltd. Partnership..

Property abutting to the north, east and west is zoned R-17 Medium Density Multiple Family. Apartments, condominiums, and townhouses abut all but the west property line. To the south, at the rear of the property, the zoning is R-8 Single Family, Two Family and Planned Residential Development and is developed as the Prescott Green Condominium complex.

SUMMARY

The plan calls for 72 units in eleven buildings at a density of 11.44 units per acre. One hundred and forty-eight (148) parking spaces are provided at a ratio of 2.06 spaces per unit. All buildings and parking will be setback 30 feet from Pleasant Meadow Boulevard. The rear of several buildings face the east and west side yards and will be setback 30 feet. The rear buildings abutting the Prescott Green development will be setback 50 feet from the property line with the rear yard sloped upward from the building finished floor elevation (1015), 4 to 5 feet to an elevation of 1019/20. A 5 ft. high batten board fence with brick pilasters (6 ft. high) will be placed along the rear property line. Assorted deciduous and evergreen trees will be planted in the yard area (see Landscape Plan). A large open lawn area will occupy the center of the site surrounded by building and interior parking. All parking areas and drives face the entrances of the

buildings and are in the interior of the lot with yard areas at the site perimeter devoted to lawn and open space. Storm water will be collected on site with detention incorporated into the design of the parking lot. Outflows are to the Pleasant Meadow Boulevard storm sewer system which flows into Mud Brook. Parking lots and drive[illegible] are bounded by 6" x 18" concrete curb or combi[illegible]on raised walk and curb.

The eleven buildings are of three types, two type A's which are each 8 unit stacked, 2 bedroom walk up units, eight type B's which are 6 unit, 3 bedroom, 2 floor townhouses and one type C which is an 8 unit building with six 3 bedroom townhouses similar to Building B but with two one-story, 3 bedroom handicapped units on either end.

All buildings will be constructed of brick on the first floor (all sides) and siding above. The following table reflects the perfected requirements of the City Zoning Code.

	Code Requirement	**Provided**
Lot Size	.275 acre	6.29 acres
Lot Area per Unit	2,500 s.f./unit unit	3,808 s.f./
Lot Width (minimum)	95 ft.	613 ft.
Lot Frontage	95 ft.	613 ft.
Green Area	35%	+56%

	Code Requirement	**Provided**
Lot Coverage	30% max.	16%
Front Yard Dept.	30 ft.	30 ft.
Side Yard/Rear Yard	10/30 ft. min.	30 ft.
Parking	144	148
Rear Setback	30 ft.	50 ft.
Distance Between Buildings	15 ft.	30 ft.

RECOMMENDATION

File P-6-96-SP is recommended for APPROVAL with the following stipulations:

1. The site will be developed and the buildings constructed in substantial conformity with the plans, drawings, elevations and specifications as contained in Planning Commission File P-6-96-SP.

2. The units shall be faced with brick on the first floor all four sides. The brick is to be red or traditional colonial color as per the samples submitted to the Planning Commission.

3. The upper level rear windows of buildings Types B and C are to be fitted with shutters.

4. Dumpster locations shall be out of the building setback area and screened with 5 ft. high batten board or brick fencing and gates.

5. All parking areas and drives shall be paved to City of Cuyahoga Falls Department of Engineering standards and bounded by 6" x 18" concrete curb or combination curb and raised walk.

6. All building and garage downspouts shall be tied directly into the on-site underground storm sewer system with dean-out connections provided.

7. Developer to pay a $500 site inspection fee to the City Engineer for site inspection services and to submit all site improvements to the City Engineer to insure conformity to City of Cuyahoga Falls Department of Engineering standards.

8. Prior to the issuance of a building permit for construction, a building permit shall be taken out for the construction of a fence at the rear of the property and the following shall be accomplished prior to the issuance of any further permits or the commencement of other construction activities on the site.

a. The rear of the site is to be graded to create a mound or rise the top is of which to be on or within six inches of the property line and run along the entire property line from east to west between the subject property and the property to the south.

b. Beginning at the top of the mound, the property is then to be graded downward toward the north to a point where the finished floor elevation of the southern-most buildings (50 it. north of property

line) is a minimum of five feet below the grade of the top of the mound.

c. At the top of the mound, no farther than six inches from the property line, the developer will erect a brick pilaster/cedar batten board fence. The pilasters will be 20 inches square, six feet high, made of the same brick as the buildings and spaced on ten foot centers. The fencing shall be a reverse batten of one by six inch, five foot high cedar boards applied between the pilasters with no voids.

d. After erection of the fence, the disturbed area will be restored, covered with top soil, planted with grass and covered with straw. The affected area will then be covered with a nylon or biodegradable mesh pinned so as to hold the grass and straw in place until the grass is successfully established. The area to be restored as per the above described procedure will be at least the first thirty feet of the slope northward from the southerly property line.

9. To secure the completion of the site, restoration and landscape improvements required by the approval of the site plan, the applicant shall, post with the Department of Industrial and Community Development a cash bond in the amount of Five Thousand Dollars ($5,000).

All lawn area shall be restored as per Item 8d and all landscaping shall be in accordance with the landscape plan included with the building permit application as approved by the Planning Division

Upon the completion of the improvements required by this approval, the cash bond shall be returned to the applicant. However, in the event the applicant fails to complete the required improvements in the time allotted by law, the cash bond shall be forfeited to the City and the City may use said bond to complete the required improvements.

/s/ _____

Louis F. Sharpe

* Note

Buckeye Community Three Limited Partnership is the developer and general partner in the development of Pleasant Meadow Village. The project will utilize a unique financing arrangement that offers tax credits provided for in the Federal Tax Reform Effort of 1986 and made permanent by the U.S. Congress in 1993. The tax credits known as Low Income Housing Tax Credits (LIHTC) are allocated to states on a $1.25 per capita basis per annum and provide an indirect subsidy to developer's who guarantee occupancy of the finished units will be available only to families whose income is 50% of the Area Median Gross Income (AMGI) adjusted for family size ($20,650 for a family of

four in Summit County) and that the rents will be no more than 30% of the AMGI adjusted for family size ($357 - 2 BR, $451 - 3BR including water, sewer and trash pickup) after deduction of a utility allowance of $62 and $86 respectively.

The tax credits are allocated and administered in Ohio by the State of Ohio Housing Finance Agency through its subsidiary, the "Ohio Capital Corp.", an independent, nonprofit company whose mission is "to cause the construction of affordable housing." The tax credit available is determined by the eligible development cost basis and the fraction of the project units set aside to the income/rent subsidy. The tax credit for new construction at 100% set aside is generally in the 70% of total project cash range and is taken over a ten year period.

The AMGI is calculated annually by the U.S. Department of Housing and Urban Development. Once selected, a tenant's income is not restricted and may rise to 140% of AMGI before a family/unit would become ineligible for the credit allocation.

See the attached ULI November 1995 article for more detail.

Cuyahoga Falls Planning Commission
Staff Summary

Utilizing the tax credit allocation funding for this project is as follows:

Source	Amount	Term	% of Total
1st Mortgage Loan (bank)	$1,655,000	9.5%/ 20 years (30 yr. amort.)	40.13%
State of Ohio (HOME & other funds) loaned by county to partnership	$300,000	8.5%/ 20 years/ deferred pmt.	7.27%
Summit County HOME & Trust Fund loaned to partnership	$325,000	8.5%/ 20 years/ deferred pmt.	7.88%
Ohio Equity Fund for Housing V	$1,844,090	Equity investment	44.72%
TOTAL	$4,124,090		

CUYAHOGA FALLS
PLANNING COMMISSION
WEDNESDAY, FEBRUARY 21, 1996
MINUTES

On Wednesday, February 21, 1996, a meeting of the Cuyahoga Falls Planning Commission was held in City Council Chambers, The Municipal Building, 2310 Second Street, Cuyahoga Falls, Ohio, at 5:30 p.m. in accordance with Chapter 107 of the Codified Ordinances of the City of Cuyahoga Falls.

MEMBERS PRESENT: Jeff Stroup, Chairman
Joe House, Secretary
Kathy Hummel
Dennis Sykes

MEMBERS ABSENT: Janna Amole, Vice Chairman

DEPT OF COMM. DEV.: Louis F. Sharpe, Planning Director
Denise Bell, Administrative Specialist
R. Benjamin Norval, Director of Community Development
Peter M. Korycan, Senior Planner
Maryanne Zarlengo, Human Resources Coordinator

The meeting was called to order at 5:36 p.m. by Chairman Stroup and the agenda was read by Secretary House. Chairman Stroup explained the order of business and how the meeting would be conducted. The first item of business was:

File P-6-96-SP: SITE PLAN REVIEW - Request to construct 72 apt. units in eleven buildings on 6.29 acres of land at a density of 11.44 units per acre on the south side of Pleasant Meadow Blvd. Located in an R-17 Medium Density Multiple Family Zoning District. Buckeye Community Three Ltd. Partnership, owner. D. E. Weatherby & Assoc., Inc., agt.

Mr. Sharpe presented the staff report, he reviewed the plan by describing the location and the project layout. Mr. Sharpe explained the property had been for sale by Ravenna Savings Bank for several years. Mr. Sharpe gave some history of the property's zoning in that prior to the merger, it was zoned for multi-family and upon merger the R-3 Pre-merger classification became R-17 Medium Density Multiple Family zoning. In December 1989, the site was approved for 92 townhouse units but was never completed. It was sold in 1995 to the applicant of the project. The applicant submitted a proposal for 72 apartment units in an R-17 Zoning District at a density of 11.44 units per acre with 148 parking spaces. Mr. Sharpe described the fence as a 5 ft. high batten board fence with brick pilasters (6 ft. high) to be placed along

the rear property line with assorted deciduous and evergreen trees planted in the yard, it would be built along the rear property line prior to building permits being issued for the apartment units. Mr. Sharpe reviewed the zoning in the area along with the code requirements for the site. Mr. Sharpe concluded his report recommending approval of the site plan citing 9 stipulations as contained in the file.

Steve Boone, President of Buckeye Community Health Foundation, explained they are a 501c3 corporation out of Columbus, they are looking to build affordable units for working people called a "tax credit project". Mr. Boone explained the rent structure and the utilities that must be paid. Mr. Boone added that a market study showed the rent to be high in this area and there is a need for affordable housing. In conclusion, Mr. Boone introduced Doug Weatherby, the architect for the project.

George Potts, Ward 8, said concerned has been expressed by residents on the northern cul-de-sac of Prescott Green because there was a conflict in the boundary between the north line of the condo project and the south line of the proposed project. The residents are concerned because they were not notified, there are two different types of lifestyles, theirs being more of a retirement lifestyle. The lifestyle of the people for the project leads to transient tenants. The fence is not enough to deter any problems or provide protection. This project receiving a substantial subsidized housing tax credit. Mr. Potts mentioned the AMHA, Section 8, and other subsidized projects in the

city; Mr. Potts asked how the tax credits worked. Mr. Boone said this project is not a Section 8 and financial institutions such as Fannie Mae, Freddie Mac, Banc One, National City Bank, etc. buy the tax credits as investors. Mr. Potts concluded his comments said the zoning characteristics of the area have changed with the R-8 zoning and maybe the surrounding zoning should be changed.

Mr. Stroup read the Chapter 1144 of the Zoning Code to the public so would know what the Commission must do. *"1144.04 PLANNING COMMISSION CONSIDERATION: The Commission shall consider the location of buildings, parking areas and other features with respect to the topography of the lot and existing natural features such as streams and large trees; the efficiency, adequacy, and safety of the proposed layout of internal streets and driveways; the location of the green area provided, bearing in mind the possible effects of irregularly shaped lots; the adequacy, location, landscaping and screening of the parking lots; and such other matters as the Commission may find to have a material bearing upon the stated standards and objectives of the various District Regulations."*

Mr. Stroup discussed the way financing is obtained for a project of this nature in that Congress set up a tax credit program and individual investors can purchase the tax credits. Mr. Stroup opened the file for discussion:

Bill Suren, 388 Village Court, asked how long the applicant had been in business and their success ratio. Mr. Boone replied they had been in business 15 years.

The tax credit program was approved in 1986, they have been developing tax credit properties since 1993, this is the 4th tax credit project. The other projects are in Troy, Heath and New Concord. Mr. Suren asked how they find this location. Mr. Boone said a realtor called him.

Paul Lint, 3520 E. Prescott Circle, said he was concerned about the impact on his property value and how this project will influence a sale. Mr. Sharpe said he is not aware of any property in Cuyahoga Falls depreciating, there is a great deal of diversity in housing in the Falls. Mr. Sharpe said *"value is in the eye of the beholder"* and also a *"sense of self-worth in the community"*. He is not aware of any devaluation.

John Thompson, 3503 E. Prescott Circle said the density was inconsistent with the density in the surrounding area, he did not feel the "performance bond" was sufficient for construction and maintenance of the barrier separating their properties from "this sardine can" of 72 units for 6 acres.

Nancy DeSalvador, 3510 Wyoga Lake Road, said no one mentions a barrier for their property on the east.

Joyce Harrington, 3600 Wyoga Lake Road, said there is too much active development in Cuyahoga Falls, there is an impact on the sewer system and what's the impact on the school system. There has been no increase in service or safety forces such as more firemen and policemen.

Lee Minier, 3404 E. Prescott Circle, said that if this development had been in place 5 years ago, a lot of the

people sitting here would not have bought their condos, they are concerned about safety and real estate devaluation. *"They know what kind of element is going to move in there, just like you have on Prange Drive."*

Gerry Pribonic, 3485 E. Prescott Circle, said the fence will be 30 feet from her foundation. There are a lot of widows in the development. People can go around the fence, there will be a different class of people living there.

Harry Bridges, 3493 E. Prescott Circle, said it is the general opinion of the people they are concerned about security, people walk around Prescott Green and Prescott Commons any hour of the day or night. Mr. Stroup reminded everyone the discussion was not about who was going to live there and there was a misconception of what this project is compared to Prange Drive, they are not the same type of project and cannot be compared.

Dick Clapp, Woodridge Supt., said they are concerned from a planning perspective due to the density of the housing. Their enrollment projections did not include a density of this nature for this area. Dr. Clapp asked if the 501c3 corporation will be maintaining ownership and if they are allowed to establish requirements of tenancy? Mr. Boone answered they have a stringent application process, federal law prohibits them from discriminating but if they don't have a job, they can't afford to pay the rent, utilities, food, etc. They do check references and previous addresses. Dr. Clapp asked if the project goes

forward, that the management encourage the residents to be involved in their children's education.

Don Whitely, 3477 E. Prescott Circle, asked how the engineering will be done to control the water and drainage. Mr. Sharpe answered that the current mound or grade is there and it is steeper and longer and extends 40 feet onto this property. Mr. Sharpe suggested if the current drainage is not sufficient, it is an issue for you (Mr. Whitely) to take up with your developer. Mr. Whitely asked about the density which Mr. Sharpe explained.

Frank Pribonic, 3485 E. Prescott Circle, asked what if a tenant loses their job. Mr. Boone said the tenant will have a lease, if they cannot pay the rent, they will be in violation of the lease and can be evicted but if they are able to pay the rent, the company cannot break the lease. Mr. Pribonic asked how much tax revenue the city will recognize for the development and asked for property tax information to compare to his. Mr. Sharpe said it would be the same millage. Mr. Pribonic said he wanted to see it in writing. Mr. Pribonic commented about Whitlatch Company and the landscaping mound. Dave Wager of Whitlatch Company responded that the landscaping was mis-installed by the landscaping company and would be corrected.

Tim Mier, 3565 Wyoga Lake Road, asked where Mr. Boone's office was located, Mr. Boone answered Gahanna, Ohio. Mr. Mier then stated his concern about the increased burden on the safety forces versus the amount of property and income taxes that will be

realized.

Lee Minier, 3404 E. Prescott Circle, asked if 2 entrances would be needed for safety protection. Mrs. Hummel replied there are 2 entrances on Pleasant Meadow Boulevard. Mr. Minier asked if Pleasant Meadow would be opened up to be a through street. Mr. Sharpe replied no.

Joyce Harrington, 3600 Wyoga Lake Road, commented that the traffic on Wyoga Lake Road is already very heavy and difficult to exit the drive way and asked if the property owners would have to pay school taxes. (Tape Change) The answer was yes, they are non-profit but not exempt from paying property taxes.

Dave Wager, Whitlatch & Co., asked if there would be an on-site manager. Mr. Boone answered there would be a resident manager plus there will be staff members from Columbus making sure the manager is performing their job properly.

Bill Suren, 388 Village Court, asked what their options are to reverse the plan, Mr. Stroup said they were looking at the file based on the merits, if approve it goes to City Council and it will be up to Council to approve or not to approve. If the owner or the city want to propose a change of zoning for the property, it can be considered. Mr. Suren asked who they had to deal with to accomplish this. Mr. Sharpe said the file is before the Planning Commission because the property is properly zoned, an individual filed an application to build something permitted in the zoning

district; who the person is and where he is getting his money is not regulated in the zoning code. Mr. Sharpe continued by saying *"what rent is charged or how it is subsidized"* would be illegal to regulate in the zoning code. Mr. Sharpe stated the residents can make their concerns known to City Council. Mr. Suren asked if an injunction could be obtained to stop this action. Mr. Sharpe said not at this time because the city is going through an administrative process. The property owner is trying to exercise his rights. Mr. Suren said someone was remiss in not notifying the public of the project and asked where that responsibility lies. Mr. Stroup said this site plan is being handled in the proper manner. Mr. Sharpe said there is no public notification on a site plan review.

Shirley Matuska, 3530 E. Prescott Circle, asked who decides Cuyahoga Falls needs this project and why was the project stopped in 1989 for the 92 townhouse units. Mr. Sharpe said the company went bankrupt that received approval for the 92 units.

Joyce Suren, 388 Village Court, asked if someone could have built high-end apartments on the site, Mr. Sharpe responded saying that is what was anticipated but Ravenna Savings had a price that most builders felt was out of line.

Karen Hayes, 3364 Hunter Parkway, asked if the maximum income was $26,000. Mr. Boone answered it was correct for a family of 4. Ms. Hayes stated then *"once they're in, they can go on public assistance."* Mr. Boone said they will have a lease, they would have to do something to break the lease before they can be

evicted such as not pay the rent.

Larry Hart, 3479 E. Prescott Circle, asked what would happen when Buckeye sells the property and someone else comes in with less stringent requirements, Mr. Boone replied they have a 30 year commitment to keep the property.

Karen Hayes, 3364 Hunter Parkway, said her question was not answered in that what happens if they go on public assistance, Mr. Boone answered they have to pay the rent, if they do not or they violate the lease in some other manner, they can be evicted. At this point, Ms. Hayes and others made references to Prange Dr. Mr. Sharpe asked Mr. Boone if a tenant could remain there if their income goes up, Mr. Boone said 115%. Mr. Sharpe said *"so they are encouraged to continue to increase income from $26,000 for a family of 4 to over $50,000."* Mr. Boone replied that statement was correct.

Richard Krausman, 3422 Wyoga Lake Road, said *"Are your little kids going to shut up right at sunset? Are your lights going to go down at sunset? We got dark out there not light, it's dark at night, no noise. I don't want light."*

Lee Minier asked if people making over $26,000 can move in, Mr. Boone said if the family is larger, they can move in. Mr. Minier said it was discriminatory. Mr. Stroup explained that the IRS set the requirement.

Susan Brady, 377 Village Court, said she does not believe the area will be safe, she walks with a very big dog, and believe Cuyahoga Falls is downgrading itself.

Dr. Clapp commented perhaps the cities of Troy and Heath can share information on those complexes for the 2 years they have been in those cities. Mr. Stroup again said the Planning Commission can't look at who is going to live there and how much money they make. Mr. Sharpe said he talked to people in Troy and the project was controversial due to the relationships with the financing. The company built what they said they were going to build, there is management on site and his contact in Troy did not have any negative comments other than it was a difficult approval process. It was similar to this project as they had land properly zoned and they followed the legal process to reach fruition. Mr. Sharpe added there are approximately 21,000 households in Cuyahoga Falls, the median income in the 1990 census is $30,885. Therefore, if the median income was $30,885, well over 40% of the households in Cuyahoga Falls might qualify to live in this development.

Sandy Rubino, Council-at-Large, said he has heard their concerns. Mr. Rubino asked if the city has a plan for fire protection in this area and which station would service it. Mr. Sharpe said he did not know which station would respond, the Fire Department was routed on the plan and did not forward any negative comments. There is adequate public water supply at the fire hydrants on the street and the water line will be looped through the development. Mr. Rubino asked the city would be getting income taxes from the developer since it is a 501c3. Mr. Boone said the partnership is not, it is a for-profit partnership so if there is income, taxes will be paid to Cuyahoga Falls.

Mr. Rubino asked is this foundation was backed by a church organization, Mr. Boone replied it was not. Mr. Rubino asked Mr. Boone what drew their corporation to this particular area since it is not consistent with the surrounding area. Mr. Boone responded they thought it was consistent.

Jerry Leipply, 3534 E. Prescott Circle and Council-at-Large, said many of his concerns have already been shared by Mr. Potts and stated to the public that the 4 members of council directly responsible to them are present to try and understand what is happening.

Mr. Potts told the public the legislation will be introduced Monday, February 26 (if approved at Planning Commission) and a public hearing before the Planning & Zoning Committee will be held on March 4th with Kathy Hummel as the chairman.

Constance Jenkins, 3474 E. Prescott Circle, said she concurs with her neighbors and shares their concerns but the Commission should give more concern about zoning and density where the school district is concerned.

Miriam Krausman, 3422 Wyoga Lake Road, asked what school district this development would be in. Several people answered Woodridge.

Ann Huston, 3491 E. Prescott Circle, asked Mr. Boone what the amount of resistance was faced in the other communities, Mr. Boone responded about 15%. Mrs. Huston asked if there were any more in process, Mr. Boone answered Sidney and Lorain; there was no resistance in Sidney and they have not reached the

hearing point in Lorain. Mrs. Huston asked if there were any communities where they had not received approval. Mr. Boone said no.

Larry Hart, 3479 E. Prescott Circle, asked Mr. Boone if the people of Gahanna would resist a project of this nature. Mr. Boone said there are 2 or 3 along Rt. 270.

Joyce Suren, 388 Village Court, asked what it will look like in 5 years; Mr. Boone said it all depends on how well it is run. Mr. Boone added he thinks people would be impressed to see some of his complexes that he has managed since 1978.

Martha Schultz, 3489 E. Prescott Circle, asked if there are any other restrictions other than the amount of money they make, can more than 1 family live in 1 apartment. Mr. Boone said they do have other restrictions and only 1 family can live in an apartment.

Lee Minier asked if there was any specific performance as far as maintenance is concerned, does a bond have to be posted? Mr. Stroup said they have to be maintained in order for the investors to keep their tax credits. Mr. Sharpe said the city has a housing code that says the property must be maintained to a certain standard.

Dick Schultz, 3489 E. Prescott Circle, asked if the trade workers will have to post a bond, Mr. Boone said the general contractor will post the bond.

Don Whitely, 3477 E. Prescott Circle, asked if the residents can rezone the property. Mr. Sharpe said

they can petition council or the Planning Commission, it gets complicated because the residents are not the property owner but it would not affect this property in that an application has already been filed under the current zoning.

Gerry Pribonic, 3485 E. Prescott Circle, said they were the ones that asked for the fence to be built first and asked the commission to understand how they feel.

Unidentified man asked if one of long apartment units could be moved away from their property line to another location and a smaller unit put in its place. Mr. Boone said he would look at that.

Unidentified lady asked what the qualifications of the resident managers would be and if they meet the income qualifications. Mr. Boone said the company trains them in property management and sometimes they meet the income qualifications but they don't have to.

Frank Pribonic, 3485 E. Prescott Circle, asked if there is a restriction on pets. Mr. Boone said no pets are allowed. Mr. Pribonic asked if a fence could be placed along another property line. Mr. Sharpe said there is no zoning requirement to buffer property from the same zoning classification.

Mr. Potts asked if the developer would have a cash flow with the rent structure, Mr. Boone said there would be due to their financing package.

Bill Suren asked if there was any option on the height of the fence. Mr. Sharpe said it will be 5 feet because a residential atmosphere is being created not industrial or institutional.

Mr. Stroup closed discussion to the public, called for a 5 minute recess and upon reconvening opened the file to the commission members.

Mrs. Hummel said she does not recall any project where there was this much scrutiny on the site plan and has never seen a requirement for a developer to put up a fence prior to starting construction, the most required has been a mound but not a mound and a fence. The configuration for the parking to be turned to the interior of the project is good and the detail addressed for the exterior of the building, she has seen samples of brick before but never samples of siding or shingles. There has been extensive attention to detail for this project and she was in favor of the project.

Mr. Sykes did not have any further questions or comments.

Mr. House said he concurred with Mrs. Hummel regarding the detail and the fence but asked where the residents will be putting their trash. Mr. Boone said their trash is to be placed directly in the trash receptacles or kept in the apartment. Mr. House asked if the width of parking spaces meets the federal requirements for handicapped persons. Mr. Weatherby said they do. Mr. House asked when the units would be in service if they receive council approval. Mr. Boone said they anticipate having the

first units ready for occupancy in the Fall of 1996. Mr. House concluded his comments saying on the basis of the zoning code, he will vote in favor of the file; the organization appears to have a good track record in maintaining their properties and it is not low income housing, it is a chance for people to get ahead.

Mr. Stroup said he concurs with Mrs. Hummel and Mr. House. The commission has every obligation to approve the plan per the zoning code as it exceeds the requirements, it is attractive and will be a definite addition to housing diversity. There is a large difference between this project and Prange Drive. The property must be maintained in order to keep its tax credits. Mr. Stroup said he knows many people who would meet the criteria for this development and he hopes Council looks at the merits of the project.

Mrs. Hummel asked Mr. Sharpe what sewer this would tie into. Mr. Sharpe answered directly into Mud Brook on county lines presently in Pleasant Meadow Boulevard no more than 300 ft. to the Mud Brook Trunk. Mrs. Hummel asked if the county was aware of the project, Mr. Sharpe said the plans will have to be approved by the Department of Environmental Services but there is no reason to believe they will not be approved.

Mrs Hummel made a motion to APPROVE File P-6-96-SP with the 6 conditions contained in the file, second by Mr. House. The vote: All yea (4-0). Motion carried. *(At the July 16, 1996 Planning Commission meeting, these Minutes were amended to correctly reflect the Motion Sheet contained in the file, there were 9*

conditions approved. The motion was made by Kathy Hummel, seconded by Joe House. The vote: All Yea.)

File P-7-96-T: TEXT CHANGE - Amending the Zoning Regulations by deletion and substitution of Chapter 1181 Amendments, Section 1181.08 Fees, Subsection 1181.08a1) by addition of fee for PORT zoning.

Mr. Sharpe explained the reason for the text change was that after the PORT District was created, it was not added to the fee schedule. It was a matter of housekeeping.

The members did not have any questions or comments.

Mr. House made a motion to APPROVE File P-7-96-T, second by Mrs. Hummel. The vote: All Yea (4-0). Motion carried.

File P-8-96-T: TEXT CHANGE - Amending the Zoning Regulations by deletion and substitution of Chapter 1132 C-N, Subsection 1132.02a) Permitted Uses and Chapter 1133 C-G, Subsection 1133.02a) Permitted Uses.

Mr. Sharpe explained that presently drive-thrus are not permitted in the C-G and C-N districts. It is the intent to allow limited use drive-thru's for less intense uses such as dry cleaning, pharmacy, video rental, etc. Mr. Sharpe recommended approval.

The members did not have any questions on the proposed changes.

Mrs. Hummel made a motion to APPROVE File P-8-96-T, second by Mr. House. The vote: All Yea (4-0). Motion carried.

Mr. House made a motion to APPROVE the Minutes of February 6, 1996, second by Mrs. Hummel. The vote: All Yea (4-0). Motion carried.

With no other business to bring before the Planning Commission, the meeting adjourned at 7:45 p.m.

JS/dab

[The Following Affidavit with Attachments Appears as an Attachment to the City's Initial Motion for Summary Judgment in the District Court Record at Document No. 32]

AFFIDAVIT OF GERALD DZURILLA

I, Gerald Dzurilla, being first duly sworn and cautioned, do hereby state as follows:

1. I have personal knowledge of the matters contained herein.

2. I am, and have been at all times relevant hereto, the City Engineer for the City of Cuyahoga Falls. My duties as City Engineer include the review, approval and/or denial of requests for building permits.

3. In April, 1996, a request for building permits for the construction of a 72 unit apartment complex on Pleasant Meadow Blvd. was filed with the City of Cuyahoga Falls. The site plan for this project had been approved by City Council in Ordinance 48-1996.

4. I sought advice from the City's Law Director, Geoffrey Kennedy, as to my authority to issue building permits for the Pleasant Meadow Blvd. apartment complex in light of a referendum petition that had been filed April 29, 1996, seeking to place Ordinance 48-1996 on the November, 1996, ballot.

5. On April 30, 1996, I received a memorandum from Mr. Kennedy in response to my request. Attached hereto as Exhibit A is a true and accurate copy of the memorandum I received from Mr. Kennedy. Since receiving this memorandum, I have

not issued building permits for the construction of the Pleasant Meadow Blvd. apartment complex with the exception of a permit to construct a fence which was issued in April, 1996. An approved site plan is not necessary for the issuance of a permit to build a fence. My actions have been based on the legal advice I received from Mr. Kennedy and have been free of any discriminatory motivation on my part.

6. On May 1, 1996, I received a memorandum from Service Director, Barbara Sculley. Attached hereto as Exhibit B is a true and accurate copy of the memorandum I received from Ms. Sculley. Because I had already received legal advice from Mr. Kennedy, and since Ms. Sculley's memorandum was not inconsistent with Mr. Kennedy's advice, Ms. Sculley's memorandum had no effect on my actions with respect to this project.

7. At no time did Mayor Don L. Robart have any discussion with me concerning the issuance of building permits for the Pleasant Meadow apartment complex.

FURTHER AFFIANT SAYETH NAUGHT

s/ _____
Gerald Dzurilla

The foregoing was sworn to and subscribed in my presence by Gerald Dzurilla this 10th day of October, 1996.

/s/ _____
Barbara E.R. Bailey
Notary Public

My commission has no expiration date.

LAW DEPARTMENT INTER OFFICE MEMO

To:	Gerald Dzurilla, City Engineer
From:	Geoffrey W. Kennedy
Subject:	Referendum
Date:	April 30, 1996

Please be advised that referendum petitions were filed yesterday with the Clerk of Council on Ordinance 48-1996. (Copy Attached). As a result of the filing of these petitions, the sufficiency of which is currently being ascertained by the Clerk, Ordinance 48-1996 does not take effect. Accordingly, any permits for work authorized by Ordinance 48-1996 must be held in abeyance until the efficacy of that ordinance is determined.

Affidavit of Gerald Dzurilla

The City of Cuyahoga Falls, Ohio
Director of Public Service, Barbara L. Sculley

To: All Service Departments

From: Barbara L. Sculley

Date: May 1, 1996

Subject: Proposed 72 Unit Apartment Complex - Pleasant Meadow Lane

Please be aware that no permits for construction should be issued on the subject project without my authority.

Due to the pending litigation and petition process, it is important that I be made aware of any such requests, should they occur.

/s/ _____

Barbara L. Sculley

Director of Public Service

/lms

cc: Don L. Robart, Mayor

[The Following Appears as an Exhibit In The District Court Record at Document No. 33]

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

[May 15, 1996]

Case No. CV96-05-1701
C.A. No 17933

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs,

v.

CITY OF CUYAHOGA FALLS, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME I OF I

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas', Summit County, Ohio, before the Honorable James E. Murphy, Judge Presiding, and commencing on Wednesday, May 15, 1996, the following proceedings were had:

MARGARET G. WELLEMEYER, RMR
Official Court Reporter
Summit County Courthouse
Akron, Ohio 44308

[P. 13] **JOSEPH JAMES OREL**

a witness herein called on behalf of the Plaintiffs, being first duly sworn as provided by law, was examined and testified as follows:

- - -

THE WITNESS: I do.

THE COURT: All right.

- - -

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Would you state your full name for the record.

A. Joseph James Orel, O-r-e-l.

Q. And can you tell me if you're employed at this time?

A. Yes, I am.

Q. And where are you employed?

A. I'm employed by JJO Construction.

Q. And how long have you been employed by that particular company?

A. Three and a half years.

Q. And can you tell me what your duties are?

A. I'm the president.

Q. And what does that company do?

[P. 14]

A. We're a general contracting firm, put up - -we put up -- we build buildings.

Q. And as president are you familiar with the development of a construction schedule?

A. Yes, I am.

Q. What is a construction schedule?

A. Construction schedule projects the time, length of time it would take to start and finish a project, bring in all the variables.

Q. Can you tell me whether or not you were aware of property that's located at the 300 block of Pleasant Meadow Boulevard in the City of Cuyahoga Falls?

A. Yes, I am.

Q. How are you familiar with that?

A. We're acting as agent for the Slane Company to put up the apartment complex.

Q. And can you tell me, have you developed a rough construction schedule for that building?

A. Yes, we have.

Q. How long would that building take based on your schedule?

A. Based on our schedule, for all the site work and the 12 buildings that are involved in [P.15] this project, we are looking at around 11 to 12

months to complete the project in its entirety.

Q. And what did you base the -- excuse me, withdraw that.

At what time period do you believe, based on your schedule, would you begin construction on that site?

A. When would we?

Q. Yes, based on your schedule.

A. Based on our schedule, we've got -- as soon as possible. I don't understand the question.

Q. Okay. What if you did not begin until after the November 1996 elections, do any construction work?

A. We wouldn't be able to even start the project until the spring of 1997 because of the winter. We couldn't get any of our site work or foundation work in because of the inclement weather.

Q. And would that delay your schedule past 1997 then?

A. Oh, absolutely.

MR. KRAMER: I don't have [P. 16] anything further.

MR. ARRINGTON: I have no questions.

THE COURT: Mr. Arrington.

MR. ARRINGTON: I have no questions, Your

Honor.

THE COURT: MR. SCHULTZ

MR. SCHULTZ: No questions, Your Honor.

THE COURT: Thank you very much, Mr. Orel.

(Witness excused.)

MR. KRAMER: Your Honor, we call as our last witness Roy Lowenstein.

- - -

[P. 17] **ROY LOWENSTEIN**

a witness herein called on behalf of the Plaintiffs, being first duly sworn as provided by law, was examined and testified as follows:

- - -

THE WITNESS: I do.

THE COURT: Please have a set, sir, and pull that microphone down to you.

- - -

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Would you state your full name for the record.

A. Roy Lowenstein.

Q. And where do you reside?

A. I reside at 748 Sheridan Avenue, Columbus, Ohio.

Q. And are you presently employed?

A. Yes, I am.

Q. At what company?

A. I'm employed with Ohio Capital Corporation for Housing.

Q. And what is that company?

A. Ohio Capital Corporation is a nonprofit [P. 18] company that helps put together affordable housing developments, and we also administer a -- an equity fund that invests in affordable projects through the low income housing tax credit.

Q. Can you explain what the low income housing tax credit program is?

A. Yes, sir. The tax credit program, which has been around about ten years, is a program whereby the Internal Revenue Service acknowledges tax credits to taxpayers, typically large corporations and banks, who invest in affordable housing developments that meet certain criteria, and in that program, the investors get to take a tax credit off their taxes if they invest their money according to rules that the Internal Revenue Service has laid out. So the program involves investment from the

private sector in affordable housing.

Q. Are you familiar with the low income tax credit program?

A. Yes, sir.

Q. And how are you familiar with that?

A. Well, that's the main part of nut company's [P. 19] work, and so we're pretty familiar with it according to the Internal Revenue code and the programs - -

Q. And how long -- I'm sorry.

And how long have you been employed by this particular company?

A. I've been employed a little more than two and a half years there.

Q. Have you had any involvement or the Ohio Capital Corporation foe Housing been involved in the property that's located at the 300 block of Pleasant Meadow Boulevard in the City of Cuyahoga Falls?

A. We've been involved in two ways. In addition to investing in these properties on behalf of the investors in the fund, we also are housing consultants, so we help put together the other pieces of the financing that's required. These are very complicated endeavors, and so we -- we were involved in putting together a grant application to the Ohio Department of Development as well as applications to Summit

County for local funds. And we also help with liaison work to National City Bank which is proposing to [P. 20] provide construction a permanent loan, so we're pretty involved in that as well as already having taken this particular project to the Ohio Equity Funds Board for an investment decision and which they did in fact vote to invest in this project. So those are kind of a -- different involvements we've had up to this point.

Q. If the plaintiffs are delayed from starting construction till after the November election, what impact, if any, would that have on any grants that you've obtained for this property?

A. Well, there is always the potential for extensions, but they're very uncertain. As far as on the grant side, we're talking about there are obligations of the developer to move forward in a timely manner with the project from -- and that would be true with the Ohio Department of Development Grant, which has been approved for the project.

Also, the local grant funding for the project was very time sensitive and, you know, Fight now, that is only available until some point, I think, this summer, after which [P. 21] it may very well be lost altogether.

Q. Do you know what the amounts of the grants are for the Ohio Department of Development and the Summit County housing - -

A. Yes. The state has the Ohio Department grant, is $300,000, and there's a total of $325,000 available from two local sources: that being Summit County, which administers funding directly from Washington in the so-called Home Program, and then there's money available included within that 325,000 from the Summit County Housing Trust Fund that's locally generated.

But the problem for both the state and the county is that they have to use their home funds or lose them, and so the risk is there that if they can't use them in a timely fashion, they will need to reallocate those funds to other developments in order to avoid losing them.

Q. Now, If these grants were lost by the plaintiffs in this case, would they be able to construct the 72 units of housing on this particular property?

MR. ARRINGTON: Object.

[P. 22]

A. We don't see how.

MR. ARRINGTON: Objection. That deals with the plaintiff's financial status and he's not qualified to speak about that.

MR. KRAMER: I'll establish – I'll withdraw it, Your Honor, establish a foundation.

THE COURT: Foundation.

BY MR. KRAMER:

Q. All right. Have you as part of the Ohio Capital Corporation for Housing reviewed the financial status of the plaintiffs in this case, including Buckeye Community Hope Foundation?

A. Yes. "We're very familiar with the financial status of Buckeye. We've done other developments with the same developer. This would be the third development that we would be investing in, and one was recently completed. And so we see financial statements, we require for purposes of investment that we review financial statements of the developers. While they do have some resources, there is no way based on those financial statements they could replace [P. 23] four or $500,000 of grant funds from the state and have the ability to develop the project.

I would also say that we are intimately involved with helping to create the development budget and the operating pro forma for all the projects. That's part of our underwriting function both as housing consultant and also as the investor in the project. That's called due diligence. And so we assist the developer in creating those budgets that we're very, very familiar with them.

Q. We talked about the grants. With regards to the same question, if the plaintiffs are delayed until after the November election, what impact, if

any, would it have on the low income tax credits that have been allocated to the particular property In Cuyahoga Falls?

A. Well, there are two ways that it's -- that the tax credit program is sensitive to time. First of all, there's an absolute deadline. In Section 42 of the Internal Revenue code, it makes it clear that all buildings, if they are ever going to receive tax credits, they [P. 24] must be placed in service within two years after the end of the calendar year in which the tax credits were originally allocated.

These tax credits were allocated in 1995, so two years from the end of 1995, or December 31, 1997, all of the housing units, all of the buildings on this project must be placed in service or else they will never get tax credits.

Placed in service means that they received -- that they received approval from the local Jurisdiction, often referred to as a certificate of occupancy, so that is an absolute deadline. So, for example, if half of the buildings were not completed by that date and placed in service, half of the tax credits for the project would be forever lost.

The other way in which the program is time sensitive is that the tax credits are worthless as time goes by to our investors. That concept is generally referred to as a credit adjuster, a credit adjuster for every month that

the tax credits are delivered to the investor, sold to the investors, and that [P. 25] can only happen after a building is fully leased up to eligible tenants. At that point that's when the credits actually vest for the investors, and so –

THE COURT: That has nothing to do with tile development corporation, though. It's their own personal tax credit, right?

THE WITNESS: Except that we will -- we have in every one of our partnership agreements, by which we make the commitment to invest in the project, we have a credit adjuster provision which reduces 80 cents on the dollar for delay. I'll explain that just if you bear with me.

THE COURT: That's to the investor, not to the corporation.

THE WITNESS: It's to the partnership, and it directly affects the developer because if, for example, if there is approximately a $20,000 per month loss in this project to the project partnership, if the units are delivered late -- right now we're calculating that these units would be delivered during 1997, in fact, relatively early in the year So for every month [P. 26] they're late, we will reduce our investment in the project by $20,000 plus or minus. The impact to the developer is that he has no other way of making up those moneys unless he's able to get grant money elsewhere

or it comes out of his developer fee or it comes out of the development corporation's assets to make up that difference because he would have no other way of making that up.

THE COURT: Go ahead, Mr. Kramer.

MR. KRAMER: I have nothing further.

THE COURT: Mr. Arrington.

MR. ARRINGTON: No questions.

THE COURT: Mr. Schultz.

MR. SCHULTZ: No questions, Your Honor.

THE COURT: You indicated there's a potential for extensions on these grants. Tell me about that.

THE WITNESS: I do know that under some circumstances this Department of Development could extend its grant. It's just really unknown whether they would. It [P. 27] would be case by case. And - -

THE COURT : So you don't know?

THE WITNESS: I don't know whether there's any potential, but I would say this. I know that from past experience that tile public agencies will not extend their funds if the project is truly in Jeopardy. We would have to be able to show that the project was still viable, that it still was extremely likely to be developed,

there were good causes for the delays and so forth.

My concern on behalf of the developer here would be that if there was substantial delay in proceeding, the overall viability of the project would be thrown into question by virtue of losing either all of the tax credits or substantial portion of the tax credits, in which case it would be prudent on the part of the public agencies with grant funds to not to grant extensions.

THE COURT: That's their business, to grant extensions.

THE WITNESS: Public agencies, you mean?

[P. 28]

THE COURT: Right, right.

THE WITNESS: They have discretion to do so.

THE COURT: They have power? Mr. Lowenstein, do they have the power?

THE WITNESS: I'm sure they have power to administer their grants, but I would just be cautious about how long that might be realistic.

THE COURT: All right. Thank you very much, Mr. Lowenstein.

(Witness excused.)

THE COURT: Yes, Mr. Kramer.

MR. KRAMER: Your Honor, other than requesting a few minutes in closing, we rest our case for the preliminary injunction.

THE COURT: All right. And you may have those few minutes, as this is not an easy matter.

Go ahead, sir.

MR. KRAMER: Thank you, Your Honor.

THE COURT: I have your memorandum and brief. I also have the reply which you may have by now.

[The Following Appears as an Exhibit In The District Court Record at Document No. 36]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

No. 5:96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs,

vs.

CITY OF CUYAHOGA FALLS, et al.,
Defendants.

Judge Bell

Deposition of STEVEN J. BOONE, President of Buckey Community Hope Foundation, called by the Defendants for cross-examination, pursuant to the Rules of the United States District Court, taken before me, the undersigned, Elizabeth A. Merritt, a Registered Professional Reporter and Notary Public in and for the State of Ohio, at the United States District Court, 526 U.S. Courthouse & Federal Building, 2 South Main Street, Akron, Ohio, on Monday, the 30th day of September, 1996, at 3:27 o'clock p.m.

[P.17] Fair Housing Act is.

If you're asking me would I believe it is partially as a result of the discrimination, I would say yes.

Q Okay. Do you believe that your right to develop your Project is superior to any right the people may have to feel at peace?

A In this instance, yes, I do.

Q And upon what do you base that belief?

MR. KRAMER: I'll object. I think it calls for a legal conclusion.

But you can answer the question if you understand it and you have an opinion.

A Well, in my opinion, we -- we have, um -- we have met all of your requirements in terms of, you know, the land was zoned by you guys R-17, we met and exceeded -- or exceeded in -- in many instances every single building requirement that you had.

I believe it's ludicrous for the people of Cuyahoga Falls to be voting on a Zoning Code they've never read and a site plan they've never seen. I mean, that's what -- what they're voting on.

By Mr. Arrington:

Q Do you believe --

A If we lose the vote, if you ask what's wrong with [P.18] our site plan, because that's -- I'd say no one could answer that, there's nothing wrong

with it.

Q Do you believe the Referendum process has violated your rights under the Fair Housing Act?

A I'm at -- I'm not entirely certain, again, what comprises the Fair Housing Act. I do believe that the reason we are not allowed to proceed is -- is based upon discrimination, I really believe that.

Q Okay.

A If that's what you're asking me.

Q Do you believe that you're being discriminated against through the Referendum process?

A I believe I am, as well as the potential residents of the -- of the Apartment Community.

Q And do you believe that such discrimination violates the Fair Housing Act?

A It's my belief, um, without -- again, without understanding what comprises the entire Fair Housing Act, I believe if discrimination is something that you're not allowed to do by law, then I believe it does.

Q Okay. Mr. Boone, I'm really not trying to trip you or put words in your mouth, please understand.

A I understand that, I'm trying to help you.

Q I understand that, too, and I appreciate that.

[P.19] In your statements on March 18, 1996, you're the one who made reference to the Fair Housing Act, and you state -- I will just quote from these Minutes -- "The fair housing act 42-US-3601 states that it is a violation of the federal fair housing act for any person including a municipality, to make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

Is that a fair summation of the comment you made on March 18?

A Yes, it is.

Q So at that time you understood that the Fair Housing Act made it a violation for any person to discriminate against you on the basis of those items that you indicated, is that true?

A Would you mind repeating that? Okay. On March 18, 1996 -Right.

Q -- was it your understanding that the Fair Housing Act made it unlawful for any person to discriminate against you on the basis of race, color, religion --

A It's unlawful to discriminate against anyone based upon those -- those avenues.

Q And do you believe that the Referendum process in [P.20] this case constitutes discrimination?

MR. KRAMER: Objection, but you can answer.

A I believe it's based upon discrimination. I believe that the reason they're doing it is based upon hate and prejudice, yes, I do.

By Mr. Arrington:

Q And did you believe that on March 18?

A Absolutely.

Q Has anything happened between March 18 and today, being September 30, to cause you to change your belief?

A Not really. I'd say it's just been confirmed more, to be honest.

Q Do you believe that the City's submission of Referendum Petitions to the Board of Elections has constituted discrimination against you, contrary to the Fair Housing Act?

MR. KRAMER: objection, but you can answer.

A The City's submission of the Referendum to the electors?

By Mr. Arrington:

Q No. Let me rephrase the question.

Do you understand that after the Referendum...

[P. 29]

...you just gave me, the statement in Paragraph 34 stating that it would be impossible to build an apartment complex after the Referendum is voted

upon, is that a true statement?

A I would have to say it's not -- I would have to say no, it's not impossible.

Q Do you recall testifying in Judge Murphy's Courtroom on May 15, 1996?

A Yes. Sure do.

Q Okay. Does a part of the financing for your Project come from State Grants?

A Yes, it does.

Q And based on your understanding of those State Grants, do you have to have your Project a percentage complete by the end of 1996?

A Yes, I do.

Q And what percentage completion do you have to have done?

A Based upon the way the system works this year, we would have to have the Project 50 percent complete by the end of 1996 to be eligible to participate in the funding round for 1997.

Q If you began construction after the November election, would you be able to be 50 percent complete by the end of 1996?

[P. 3O]

A No, we would not.

Q And how would that affect you?

A Next year, when we go to apply to do another Project someplace to help people, we -- they would -- they would say, "Well, you didn't follow through on what you'd promised you'd do last year," and so they wouldn't give us a Grant, which is necessary for this type of development. We'd be ineligible.

Q. Would that ineligibility or the prospect of that ineligibility deter you from constructing your Project after the November election?

A I don't understand what you're asking, but the possibility of us not getting it, make us not want to do it, is that what you're asking?

Q Yes.

A No. No, it wouldn't. We'd still want to -- we'd still try as hard as we could. A lot of people are going to be benefitted by this Project. I mean -

Q Is there a point in time where you will say, "We just simply can't do the Project in time"?

A That -- that point in time could happen this second. It's very complicated. There's a lot of things that will affect that decision. If interest rates rise above a certain --here's the thing, that fund, you have to match -- [P.31] number one, you match your sources and uses of funds. In other words, we've got a half million dollars in State and Local, County Grants, we have $125,000 in the Housing Trust Fund, we sell these tax credits for X-amount of dollars, which brings in equity, we have a construction loan

commitment from National City Bank, but those numbers are all fixed, that's the most it's ever going to be. You know, I can't -- and because I can't raise my rents, because I've committed to keep the rents at this certain level, so expenses go up, which throw my sources and uses out of balance, and we can't continue.

If lumber prices go up today to a level that we -- that's way above our budget, the ship is sunk as of this second.

If interest rates increased to a certain level, we're finished. There's a lot -- it just goes on and on and on.

Q Let's assume also, just a fact, and I'm going to assume this fact, you may or may not be aware of it, let's assume that the Board of Elections in Summit County does not certify an election result until mid-December. And let's assume that that certification is necessary for you to get your Building Permits.

[P. 32] If that is in fact the case, that the Board of Elections cannot certify the election till mid-December, and let's assume, again, that you win the election, would you still proceed with your Project?

A I really don't see how we could, Virgil. It would be a miracle at that point.

Q If you look at the cover of Defendants' Exhibit C, actually the -- go to the second page, please.

A This page? (Indicating)

Q Yes.

You've listed several people as Defendants. You've indicated the City of Cuyahoga Falls, and you've also indicated Don Robart, and we'll come back to him.

Looking at Gregg Wagner, has Gregg Wagner done anything to damage the Plaintiffs in this case?

A Personally?

Q Yes.

A No.

Q Has he done anything officially to damage the Plaintiffs in this case?

A I believe as an agent of the City he has, by processing the Referendum. I mean, processing the signature for the Referendum vote.

...[P.155] mentioned to Jack that I haven't been able to pay people as quickly as we would like, because this Project has put us in -- we have very little money in the bank, that's why I'm going out and begging people to help us, because of that. Some of my suppliers, my surveyors, Engineers, they've been without money on other developments for weeks, and they're not going to work for me anymore, so it's starting to affect other jobs that we have.

So that's what we have on the table at this moment.

Now what's happening next year, Virgil touched on it, if we don't get 50 percent completed, we're not going to be able to receive Grants for Projects we would do next year. And we had four reservations, we have four Projects under development now for 1996. Three in 1995. So it's just irreparable harm, it's really a tragedy, it really is. We're going to fight on.

MS. CITRINO: Thank you, I don't have anything further.

MR. MORRISON: Anything?

MR. ARRINGTON: Diane, I'd like to ask a follow-up question following up.

SELECTED PAGES FROM THE DEPOSITION OF FRANK PRIBONIC WHICH APPEARS IN THE DISTRICT COURT RECORD AT DOCUMENT NO. 48

***

[p. 21] A Yes.

Q What were the concerns that you, yourself raised at the meeting at your condo?

A The density, the burden on the Woodridge school system, traffic problems, on Wyoga Lake Road, that was probably most of it or all of it.

Q Okay. Was the Mayor responding to people's concerns?

Was that his role at the meeting?

A He was just sitting there.

Q Did he say anything at the meeting?

A I don't recall what he said.

I'm sure he said something but I don't recall what he was.

I don't know if he made a comment or not, to me, he didn't.

Was this a meeting that one person at a time was talking or were people just kind of milling about the room talking?

A Probably all 20 at one time.

Q Okay. Now we talked about that meeting at your condo in connection with my question

about whether you had any other meetings where Mayor Robart or other City officials were present other than City Council meetings, where you talked about this...

[p. 37]...referendum?

A No.

Q Was it discussed more than once?

A I don't recall.

Q Okay. But you thought it sounded like a good idea because you went ahead and took the initiative, right?

A You bet.

Q And was it your idea to call it Citizens for Preservation of Voters Rights?

A No.

Q Whose idea was that?

A That was one of the 20 or 30 people that were present at some of the meetings.

Q Okay.

Q Well, the only meeting that we have talked about that had 20 -- we talked about two meetings that had 20 or 30 people. One was at your condo where the Mayor was invited to attend and one was at this eatery at State and Bath Road.

Are you referring to one of those meetings or is there a different meeting that --

A Oh, we had several meetings at our complex and other houses, likewise.

[p. 38]

Q Can you tell me about those meetings?

A Well, they were all the same as the others, people were just talking about everything and

Q Okay.

A They were upset and nervous and concerned.

Q None of these meetings did anyone from the City attend?

A Not to my knowledge.

Q And the Mayor wasn't at any of those meetings?

A Not to my knowledge.

Q Did you walk around?

Did you have a walk list and ask people to sign the petition?

A Yes, I did.

Q What was it that you would tell people when you invited them to sign the petition?

A We asked if they would be willing to sign the petition to get this on the ballot in November

Q Did people ask you questions?

A No. Most of them were aware of the situation.

Q And were the majority of people willing...

[p. 59] ...east side before coming to the meeting?

A They talked to me about it, they found out about it.

Q Before the meeting on the 21st?

A Yes, that was not discussed in the Council meeting with those people by me.

Q But you had spoke with some people who lived on that east side before the meeting then?

A Some of the people came to our house during some of those meetings that we had throughout the early months.

A People that live on Wyoga Lake Drive and Pleasant Meadow.

Q Would you say that you were a leader of this referendum drive?

A No, our house was just the biggest.

Q Who were the leaders of referendum drive?

A Don't think there was a leader.

In fact, we had no leaders.

As I stated earlier, my name and my wife, Beth's name only appears because the Board of Elections said that we had no spokesman and no leaders.

Q Were there any people from the City that were particularly helpful for you?

A In what way? [p. 60] I don't understand.

Q In any way to do the referendum drive.

A They didn't-help us, we did it on our own.

Q Well, you mentioned Marilyn Slabey at Board of Elections?

A Talking about at the City of Akron.

Q She is at the City of Akron?

A Yes, the Suranit County Board of Elections.

Q Sorry, so that was Summit County?

A Yes.

Q Well, was there anybody at Summit County that helped you besides Marilyn Slabey?

A There was a Mary Pat, I don't know if that is her middle or last name.

Q Um -- Um.

A And there was a gentleman named Dan, I don't recall Dan's last name.

Q Did they all work at the Board of Elections?

A Yes or do.

Q Did they -- how much time would you say the 3 of them all together spent helping you with this?

A ½ hour, total man hours, ½ hour.

[p. 61]

Q Did any of them live in Cuyahoga Falls?

A I have no idea.

Q Did it come-up about what you were going be trying to put in this referendum?

Did you discuss the substance?

A We told them about what we wanted.

We were new to it, we wanted to know what you do to get something on the ballot in November and they were kind enough to tell us.

Q And how about with the City of Cuyahoga Falls, Council people, the Mayor, administrative people, City employees, any people like that who helped you with this referendum drive?

A No, we did it on our own.

Q Did you get any enccuragement from any people at the City?

A In what way did we get encouragement?

Our lines were set, we knew you what we had to do.

Q You told me you weren't sure whose idea referendum was?

A Right.

Q Could have been somebody from the City, their idea?

A Maybe.

[p. 62]

Q Okay, well, that is something I would consider encouragement to do it, if somebody gave you the idea to do it so that is what I mean.

A Well, maybe this will clear this up.

My son-in-law at one of our meetings said it seems like you should be able to put this to a vote, Dad, or to the people, maybe he didn't say Dad.

Q Okay.

A To the people and I think that jogged some minds, a situation like this could be put on the ballot.

Where he got his information, he is from Cleveland, I have no idea.

Q So he doesn't work for the City of Cuyahoga Falls?

A No.

Q. Was the Mayor at that meeting where your son-in-law brought that up?

A I don't know, I don't recall.

Q Do you typically attend public meetings of the Planning Commission or the City Council?

A No.

Q Is the one on February 21st your first, the first one you have ever attended?

A When this project came up for discussion,...

[p. 71]

Q Did anybody?

A Well, other than how are you doing, here are the petitions, we have 4,300 of them and --

Q Had somebody from your organization been communicating with the Law Department that you know of?

A No, we had no reason other than to ask them -- no, I don't even I know, I didn't.

Q I'm confused, because I know the City Charter for Cuyahoga Falls seems kind of confusing to me in terms of what the requirements are for a petition. I'm just wondering who helped you figure that out?

A Well, I don't mean to be -- how do I say it?

That way, to me, it wasn't confusing because Greg Wagner indicated that we need -- maybe it was Mr. Kennedy, that we needed 10% of the registered voters to sign the petition.

Q Okay. Well, do you know if it was Mr. Kennedy or Mr. Wagner?

A I don't recall, probably Greg Wagner.

Q Okay. Greg Wagner talked with you about it?

A Well --

[p. 73]

We had all the people that wanted to participate who came up to the stage and we said what Ward, what precinct, do you want hand them Wrote down the name and then said when you get things full, turn them in to us.

Q Us was?

A Me.

Q And that was meeting that Mayor Robart was at, correct?

A At the North Hampton Grange Hall?

A Yes.

Q And the Mayor did the Mayor ever express to you that he was in favor of this referendum going forward?

A I don't recall him saying anything about the referendum, being in favor or against it. It was our right to do.

Q Didn't he by staying and being at that meeting, indicate with his presence, that he was there to help you with the referendum?

MR. ARRINGTON: Objection.

A I didn't take that -- he was just there.

He didn't say anything to us about -- we already had ground work laid, he was just there.

Q Well, isn't the real reason that he.....

[The Following Appears as an Exhibit in the District Court Record at Document No. 50]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5 96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs

vs.

CITY OF CUYAHOGA FALLS, et al.,
Defendants

---oOo—

Deposition of GERALD M. DZURILLA, one of the Defendants, called by the Plaintiffs as if on cross examination, taken by Beverly J. Modic, a Stenotype Reporter and Notary Public within and for the State of Ohio, pursuant to the Statutes and the further stipulation of counsel herein contained, on Thursday, the 8th day of August, 1996, commencing at 10:00 A.M. at the law offices of Kramer & Niermann, 3244 Prospect Avenue, Cleveland, Ohio 44115.

---oOo—

[P. 2]

APPEARANCES:

On behalf of the Plaintiffs:

Kramer & Niermann
3214 Prospect
Cleveland, Ohio 44115
BY: EDWARD G. KRAMER, ESQ.
AND DIANE CITRINO, ESQ.

On behalf of the Defendants Gregg Wagner, Summit County Board of Education and Gerald M. Dzurilla:

Virgil Arrington, Esq.
2310 2nd Street
Cuyahoga Falls, Ohio 44221

On behalf of Defendant Mayor Donald Robart:

Amer, Cunningham, Brennan Co., L.P.A.
Key Building, Sixth Floor
159 South Main Street
Akron, Ohio 44308-1322
BY: STEVEN W. MASTRANTONIO, ESQ.

Also Present:

Mr. Steve Boone.

---oOo—

[P. 19]

drawings separately, and submit the comments on the project, and they are all incorporated in this letter.

Q. For an apartment complex of this size, does Exhibit 1 have an unusual number of documents?

A. No, it doesn't.

Q. Did you receive a follow-up to Exhibit 1?

A. Yes.

MR. KRAMER: Would you mark this, please?

---o0o—

(Whereupon, a document was marked for purposes of identification as Buckeye

Deposition Exhibit 2.)

---o0o—

Q. I show you what has been marked as Buckeye Exhibit 2.

Can you identify that document?

A. This was the developer's response to our initial plan review letter.

Q. Has the various departments in the City of Cuyahoga Falls now reviewed the additional materials that were sent with Buckeye Exhibit 2?

A. The Building Department reviewed all their items [P. 20] pending, and it was approved.

The only departments that had any disapprovals was the Fire Department. That was in the matter of a six inch water main versus an eight inch water main.

And the Planning Department had a disapproval, also.

Q. Was that information provided to the developer?

A No. We haven't got to that point.

Q And can you tell me why?

A Because let's see, there was a reason, because of the referendum issued. We asked the Law Department for a legal opinion on the case, and they told us because the plan basically was not approved, we would not issue a building permit.

So we stopped further action on the project.

Q Is there any reason why either the fire department or the Planning Department could not have provided information to the developer?

A (Witness shakes head).

Q Other than the fact that you can't issue a building permit?

A We can't issue a building permit until we got concurrence from all the departments, and we ...

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5 96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs

vs.

CITY OF CUYAHOGA FALLS, et al.,
Defendants

---oOo—

Deposition of LOUIS SHARPE, a witness, called by the Plaintiffs as if on cross examination, taken by Beverly J. Modic, a Stenotype Reporter and Notary Public within and for the State of Ohio, pursuant to the Statutes and the further stipulation of counsel herein contained, on Thursday, the 8th day of August, 1996, commencing at 1:00 A.M. at the law offices of Kramer & Niermann, 3214 Prospect Avenue, Cleveland, Ohio 44115.

---oOo—

[P. 2]
APPEARANCES:

On behalf of the Plaintiffs:

Kramer & Niermann
3214 Prospect
Cleveland, Ohio 44115
BY: EDWARD G. KRAMER, ESQ.
AND DIANE CITRINO, ESQ.

On behalf of the Defendants Gregg Wagner, Summit County Board of Education and Gerald M. Dzurilla:

Virgil Arrington, Esq.
2310 2nd Street
Cuyahoga Falls, Ohio 44221

On behalf of Defendant Mayor Donald Robart:

Amer, Cunningham, Brennan Co., L.P.A.
Key Building, Sixth Floor
159 South Main Street
Akron, Ohio 44308-1322
BY: STEVEN W. MASTRANTONIO, ESQ.

Also Present:

Mr. Steve Boone.

---oOo—

[P. 19]

A. I believe it is in the general provisions of the zoning code.

Q. What was your concern about providing this fence? What basis was the need for the fence to be put up?

A. I believe Mr. Boone and I discussed that at length, regarding the sensitive nature of the fact that this project would be a larger family type project where there would be significant amount of activity related to children, and that the adjoining property was currently developed as a condominium development with a large number of senior citizens.

There was concern on the part of the community that there would be interaction that was not warranted or wanted.

Q. Was this after any public meetings, or was it before?

A. Long before.

Q. And how were you aware of the concerns that the community had with having the Plaintiff's site being developed next to this condominium association?

A. In my 20 years of experience, I have come to be quite familiar with what the majority of....

[The Following Appears as an Exhibit In The District Court Record at Document No. 143]

APPRAISAL OF
6.2906 ACRE VACANT SITE
PLEASANT MEADOW BOULEVARD
CUYAHOGA FALLS, OHIO

Prepared for
Buckeye Community Hope Foundation
C/O Ms. Diane E. Citrino
The Housing Advocates, Inc.
3214 Prospect Avenue, East
Cleveland, Ohio 44115-2600

By
Brian W. Barnes, MAI, CRA
Brian W. Barnes & Co., Inc.
Realtors Appraisers Consultants
5900 Sawmill Road
Suite 120
Dublin, Ohio 43017-2539
(614) 761-0067
FAX (614) 766-2406

October 10, 1997

Buckeye Community Hope Foundation
c/o Ms. Diane E. Citrino
The Housing Advocates, Inc.
3214 Prospect Avenue, East
Cleveland, Ohio 44115-2600

Re: Complete self-contained appraisal of a 6.2906 acre vacant parcel of land located on the south side of Pleasant Meadow Drive, being approximately 450 feet west of Wyoga Lake Road, in the City of Cuyahoga Falls, Ohio

Dear Ms. Citrino:

Pursuant to your request, I have inspected the subject site known as a vacant 6.2906 acre parcel of land located on Pleasant Meadow Blvd. in the City of Cuyahoga Falls, Summit County, Ohio. At your instruction, I have completed an in-depth analysis and appraisal of the property in order to estimate the value of the **fee simple rights of ownership** thereto as zoned for medium density multi-family residential development to a density of twelve units and assuming a much lower density of 2 to 6 +/- units per acre. My analyses and conclusions are being reported in a complete summary report format attached herewith for your review.

Valuation Estimate

I have thoroughly analyzed the property and studied applicable comparable data as explained within this report. Subject to the premise of the appraisal as defined herein, it is our opinion that the most probable market value for the subject property, as of October 9, 1997, is:

As Zoned - R-17, Multi-family	$276,000
Market Value - If Zoned R-8	$157,000 to
(8 Units Per Acre)	$189,000

Market Value - If Zoned R-2	
or R-4 (Single Family Use 2	
to 4 Dwellings Per Acre)	$100,000

It is my opinion that a knowledgeable developer would most likely acquire the site near the lower range of the multi-family valuation at $160,000

This report has been prepared in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP). Further, it is hereby certified that this appraisal assignment and the following report was not based on any requested minimum valuation, specific valuation, or any predetermined event. At your request, the valuation reported herein is in a complete self-contained format.

If you have any further questions or require additional information after reviewing this report, please contact my office at your convenience.

Respectfully submitted,

/s/ _____

Brian W. Barnes, MAI, CRA

State of Ohio General Certification #380582

BWB/lw

[The Following Appears as an Exhibit In The District Court Record at Document No. 143]

A REVIEW OF LAND USE PLANNING PRINCIPLES EFFECTING BUCKEYE COMMUNITY HOPE FOUNDATION et al. v. CITY OF CUYAHOGA FALLS et al.
CASE NO. 596 CV 1458
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Report Prepared by:
Ailen Fonoroff, A.I.C.P.

MEMORANDUM

TO: EDWARD G. KRAMER and DIANE E. CITRINO

FROM: ALLEN FONOROFF, A. I. C. P.

RE: Expert Report Prepared for the Buckeye Community Hope Foundation Litigation

DATE: October 17, 1997

Upon being retained by plaintiffs counsel, I took the following steps to prepare this report. I first met with counsel on September 4, 1997 to understand the pertinent facts involving this litigation. During this discussion, I was given the specific assignment which is the basis of my opinions stated in this report. I reviewed the following data in forming my opinions stated in this report, including the *Cuyahoga Falls 2010 Land Use and Thoroughfare Plan*, the *Cuyahoga Falls zoning regulations effective July 23, 1974 and revised February 1997, the zoning map of Cuyahoga Falls*, and the *Site Plan for the Pleasant Meadow Apartment Complex*. Finally, I visited the site with Douglas Weatherbee, the architect for the project, to better understand the surrounding neighborhood and the

impact of the proposed apartment complex. I base my opinions on the above data and my some fifty (50) years of experience with land use issues.

Question presented: Is there any justifiable legal reason to deny the site plan of Buckeye Community Hope Foundation on Pleasant Meadow Blvd., Cuyahoga Falls, Ohio?

Based on my expert opinion, there is no reasonable justification or rational basis for the rejection of Ordinance No. 48-1996 by the Referendum held on November 5, 1996 rescinding the approval of the Site Plan for the Pleasant Meadow Apartment Complex.

The Site Plan

Many modern zoning ordinances, like the one adopted by the City of Cuyahoga Falls, contain provisions for site plan review, and this is among the most useful techniques involved in modern zoning. In regulating such development, site plan review performs appropriate functions which are concerned primarily with the layout of buildings and open space, including parking areas, and the provision for access to and from public street systems.

Site plans are essential in any type of multi-building development because they provide the picture of what will take place for all to see. This includes the planning staff, the Planning Commission, the City Council and all of the people who attend required public hearings. The approved site plan becomes an essential part of the implementation ordinances. This process provides the planning staff and others an opportunity to examine and conclude

whether or not a specific site plan is appropriate in terms of its impact on the neighborhood, its traffic generating capacity, and other considerations. The process is an effective means of regulating and improving land use development.

Review of Site Plan

My examination of the Pleasant Meadow development site plan reveals eleven (11), one (1) and two (2) story buildings containing seventy-two (72) dwelling units, provisions for off street parking within the interior of the development and U-shape access through the development providing two (2) points of ingress and egress. The land in question is located in an area zoned R-17, which is located on Pleasant Meadow Boulevard. This is a medium density land use area. The zoning ordinance for development for such an area permits nine (9) to seventeen (17) dwelling units per acre. The zoning designation reflects the recommended land use in the Cuyahoga Falls Land Use and Thoroughfare Plan.

The plaintiff's development proposal is well within all the requirements of the zoning ordinance-approximately eleven and one-half (11.5) dwelling units per acre. The dwelling units are located with yards and set backs exceeding those required by the zoning ordinance. The plaintiff's land is surrounded by one (1) and two (2) story residential construction and vacant land. Moreover, the area is served by public water and sewer, and there is no suggestion that seventy-two (72) additional dwelling units will overtax the system.

All of the material analyzed for the Pleasant Meadow development was discussed and examined with the public officials responsible for decision making, and during the course of public hearings. These officials would have reviewed the site and the neighborhood. They also would have examined the zoning ordinance and the Land Use and Thoroughfare Plan to insure compliance. All of this would have occurred before official approval.

In my opinion the proposed land use is very compatible to all of its surroundings. I cannot find any negative impact to the neighborhood in particular or the City of Cuyahoga Falls in general. Considering all these facts I conclude that there is no rational basis in law for the denial of this site plan. The zoning designation of the land, R-17, is compatible with the Land Use and Thoroughfare Plan adopted by the City of Cuyahoga Falls. The development proposal is also in accordance with that plan. The Planning Commission and the City Council approved this site plan in accordance with the Cuyahoga Falls Land Use and Thoroughfare Plan.

The proposed development conforms completely with all of the current regulations in Cuyahoga Falls. As the City's own Land Use and Thoroughfare Plan states:

> Medium density multi-family development is defined as apartment buildings, which will offer many of the advantages associated with single family homes. Garden apartments, as their name implies, have low land coverage. In

> keeping with a goal of preventing over crowding and the creation of desirable living space, development standards of a maximum of seventeen (17) units per acre are recommended

(Cuyahoga Falls Land Use and Thoroughfare Plan page 22).

Planning and Zoning

Planning is a means to a better and more economical government. Cities develop in response to economic and social requirements of their population. Zoning is a major legal tool to implement land policy as shaped by the city's Land Use and Thoroughfare Plan. The basic instrument of city planning is the Land Use and Thoroughfare Plan.

The city of Cuyahoga Falls appears to have prepared a very comprehensive and well-written plan. It is based upon economic, social, and environmental data, which is a reflection of the total community's needs and desires for its future development. The plan is also a foundation for the city's capital improvement program and capital budget. The latter earmarks the allocation of tax dollars to accomplish the physical needs identified in the Land Use and Thoroughfare Plan--parks, recreation facilities, streets, etc. Based on these analyses, the plan expresses the goals of the community.

All relevant information provides the framework for legislative action. The official adoption of the plan and the enactment of the zoning ordinance by the elective representatives of the people has a firm basis

in fact, not prejudice, whim or hunch. This comprehensive analysis by the legislative body is not duplicated by the referendum process.

"Land use planning implies looking toward the future welfare of the community and is essentially a local government function. It is a technical, social, and political process requiring a variety of information. The city administration studies population, economic, social and environmental data, and proposes changes in land use, infrastructure, and the physical environment. Translated into a current land use plan, the data provides an understanding of land use relationships and establishes the corollary between zoning, land use stability, and public health, safety and welfare." (Cuyahoga Falls Land Use and Thoroughfare Plan, page 13).

I have attended hundreds of Planning Commission hearings and meetings. I have reviewed thousands of site plans. My experience shows that the public vote rescinding Ordinance No. 48-1996 which had approved the Site Plan for the Pleasant Meadow Apartment Complex was not based on compliance with the municipal zoning and land used laws of the City of Cuyahoga Falls.

Ballot box decision-making exacerbates the problems inherent within traditional zoning decisions. The results are usually more extreme than those decided by local Planning Commissions since the public tends to react and vote their fears and prejudices (namely lowering of property values, introduction of incompatible lifestyles and the tax

burden of new children on the local school system) as reasons for denying an appropriate lawful site plan.

[The Following Appears as an Exhibit In The District Court Record at Document No. 173]

BUCKEYE COMMUNITY HOPE FOUNDATION

947 East Johnstown Road, Suite 221
Gahanna, Ohio 43230
(614) 337-9718
FAX (614) 337-2596
(614) 337-0480

June 20, 1996

City of Cuyahoga Falls
Engineering Department
2310 2nd Street
Cuyahoga Falls, OH 44221-2583

RE: APPLICATION FOR BUILDING PERMIT/PLEASANT MEADOWS APARTMENTS

Dear Sir or Madam:

On April 5, 1996, on behalf of Buckeye Community Three L.P., we submitted an application for a building permit for Pleasant Meadows Apartments, a 72-unit apartment development slated for construction on Pleasant Meadows Boulevard, Cuyahoga Falls. We have been advised that you are not processing this application because of a pending referendum vote which seeks to overturn the site plan approval which this project has received.

Under the authority of Gibson v. City of Oberlin, 171 OS 1 (1960), Buckeye Community Hope Foundation, acting on behalf of Cuyahoga Housing Partners, Inc., General Partner of Buckeye Community Three L.P., under the terms of a closely-held corporation agreement, hereby makes demand that you forth with issue the building permit referenced above or show just cause why the building permit should not be issued.

Please reply to this correspondence promptly because of the severe time constraints under which the development must proceed. Thank you.

Very Truly Yours,

/s/ _____
P. Gilbertson Barno
Executive Director

pgb:hs

[The Following Appears as an Exhibit In The District Court Record at Document No. 173]

City of Cuyahoga Falls
Department of Building Inspection
2310 Second Street
Cuyahoga Falls, Ohio 44221-2583
Phone: (320) 971-8100
Fax: (330) 971-8168

June 26, 1996

P. Gilbertson Barno, Executive Director
Buckeye Community Hope Foundation
947 East Johnstown Road, Suite 221
Gahanna, Ohio 43230

RE: Building permits for Pleasant Meadow Apts, letter of 6-20-96.

Dear Mr. Barno:

The Codified Ordinances of the City of Cuyahoga Falls prohibit me from issuing a building permit for a project that is not in compliance with the Zoning code. The site plan approval you claim to have received from City council is currently the subject of a referendum. By Charter, the ordinance granting that site plan approval does not take effect unless it is approved by the voters. It is my understanding that the Summit County Common Pleas court has ruled on the referendum issue, and upheld the Charter. Accordingly, there is no site plan approval as required

in the Zoning code, and I am prohibited by law from issuing a building permit.

Sincerely,

/s/ _____

Gerald H. Dzurilla, P.E.
City Engineer
Chief Building Official
City of Cuyahoga Falls, Ohio

GMD.cb

cc: Virgil Arrington Jr., Deputy Law Director

[The Following Appears as an Exhibit In The District Court Record at Document No. 173]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5 96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs

vs.

CITY OF CUYAHOGA FALLS, et al.,
Defendants

---oOo—

Deposition of DONALD L. ROBART, one of the Defendants, called by the Plaintiffs as if on cross examination, taken by Beverly J. Modic, a Stenotype Reporter and Notary Public within and for the State of Ohio, pursuant to the Statutes and the further stipulation of counsel herein contained, on Thursday, the 26th day of September, 1996, commencing at 9:30 A.M. at the Federal District Court, 2 South Main Street, Akron, Ohio.

---oOo—

[P. 2]
APPEARANCES:

On behalf of the Plaintiffs:

The Housing Advocates
3214 Prospect
Cleveland, Ohio 44115
BY: EDWARD G. KRAMER, ESQ. AND DIANE CITRINO, ESQ.

On behalf of the Defendants Gregg Wagner, Summit County Board of Education and Gerald M. Dzurilla:

Virgil Arrington, Esq.
2310 2nd Street
Cuyahoga Falls, Ohio 44221

On behalf of Defendant Mayor Donald Robart:

Amer, Cunningham, Brennan Co., L.P.A.
Key Building, Sixth Floor
159 South Main Street
Akron, Ohio 44308-1322
BY: JACK MORRISON, FR. AND STEVEN W. MASTRANTONIO, ESQ.

Also Present:

Mr. Steve Boone, and Mr. Mark McTernan.

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[P. 7]...marked for purposes of identification as Buckeye Exhibit 16.)

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Q. I am just going to show you what has been marked as Buckeye Exhibit 16. I don't believe you have seen this document before; is that correct?

A. I have not.

Q. What I am asking you in this question is, would you agree that the City of Cuyahoga Falls population is around approximately 15,000?

A. Yes, sir.

Q. And would it be fair to say that about 98 percent of the population is Caucasian?

A. Yes, sir.

Q. And that the Afro-American population is probably below one percent?

A. Yes, sir.

MR. ARRINGTON: Just note an objection to the record.

The document that you have given indicates an Afro-American population in excess of one percent, if you just simply....

[P. 37] (Whereupon, Mr. Morrison Left the deposition room.)

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Q. Mayor, you have had a chance to look at Buckeye Exhibit 17; is that correct?

A. Yes.

Q. And that is the minutes of the Planning and Zoning Committee of Cuyahoga Falls City Council for March 4th, 1996; is that correct?

A. Yes.

Q. Do you usually attend the Planning and Zoning Committee Meetings?

A. Yes.

Q. When you attend those, are you doing that in the course and scope of your official capacity as Mayor?

A. Yes.

Q. And you were at the March 4th, 1996 meeting; is that correct?

A. Yes.

Q. Would you go to Page 11?

A. Okay.

Q. And I would like you to read on Page 11 and 12, 13, and part of 14, the statements [P. 38] that are attributed to you.

Now, and then I am going to have some questions to ask you.

A. (Pause).

Q. Mayor, you have had an opportunity to read those pages that are attributed to you?

A. Yes.

Q. Buckeye Exhibit 17?

A. Yes.

Q. Okay. My first question is, is there any of these statements that are attributed to you, which you believe you didn't make?

A. No.

Q. Second, with regards to Buckeye Exhibit 18, after reading Buckeye Exhibit 7, and specifically the statements you made, do you recall whether or not at this meeting you had a copy of Buckeye Exhibit 18?

A. I don't recall.

Q. On Page 11, you made a statement, I point that out, because in George's memo that came out to you, it sort of implied as though we had at local government, some control to turn this thing around.

[P. 41]

...I know Mr. Potts was very, very concerned.

Q. So while you can't recall specific meetings or discussions with Mr. Potts, is it fair to say that you believe you did discuss Buckeye Exhibit 11 with Mr. Potts prior to the March 4th, 1996 Planning and Zoning Committee meeting?

A. I don't recall speaking with Mr. Potts about the exhibit. His form of informing his counsel or his constituency is his decision.

I was referring to the fact that he had brought concerns to me fairly often during that time frame relevant to his feelings about it.

Q. And what was his feelings concerning the project?

MR. MORRISON: Objection.

Q. Or what did he express to you?

MR. MORRISON: Objection to the form of the question.

A. He felt that the public at large, the majority of the public, was strongly opposed to this project, and the momentum, [P. 42] I am characterizing for him, but the momentum in opposition to this project was growing rapidly.

Q. Turn to Page 12 of Plaintiff's Exhibit 17, at about two-thirds down, you make a series of statements, "We can be sued as a City, we can be sued individually in our individual capacities, we can be sued as an administration and City Council, and in the end, if we are, the reality is, we are probably going to lose."

I guess first, why did you make that statement at that time?

MR. MORRISON: Go ahead and answer.

A. Because that's what was related to me from the Law Department.

I am not an attorney, so I have to bank on them.

Q. Now, further down on Page 12, you make the following statements. "I noticed in the paper today and some of you might have read it, there was an article called "Mark's stuck in the ghetto".

It talked about subsidized housing, [P.43] Section VIII housing, and it talked about problems associated with it.

If you read it, it said the proponents of subsidized housing want to put the low income out into the suburbs.

Now, why did you make that statement at that time?

A. Because that was a lot of the sentiment that was being conveyed to my office.

Q. Concerning the Plaintiff's project?

A. Correct.

Q. On Page 13, you continue, "Part of them was -- "we in Cuyahoga Falls, Tallmadge, and Stow, and some of the other suburbs ought to have more subsidized housing.

Well, the reality, folks, is we have done our part. We have done our part off of Graham Road."

What are you talking about?

A. We have a fairly large project of subsidized housing off of Graham Road in Cuyahoga Falls.

Q. And is that on Prange Drive?

A. Yes.

Q. And when did that project come in?

[P. 44]

A. I would say that went in in the early to mid 1980's.

Q. Have you ever been in that project?

A. Yes, sir..

Q. And did you observe any Afro-Americans living in that project?

A. Yes.

Q. Would you agree or disagree that the project on Prange Drive is the only place in Cuyahoga Falls that has a substantial number of Afro-Americans?

MR. MORRISON: Objection.

MR. ARRINGTON: Objection.

A. To the best of my knowledge, it is.

Q. Now, continuing on Page 13, it states, "So anybody that wants to paint us as bigots or anything else is flat out wrong."

Why did you make that statement?

A. I made that statement because I am sensitive to a perception that the community has any racist or bigoted tendencies. The local newspaper periodically used to write, they haven't for some time, but they used to use the [P. 45] term Caucasian Falls with reference to the City.

I think it was more of a play on words than anything else, but they were fond of pointing that out.

Q. You say the local paper, is that the Akron Beacon Journal?

A. Yes.

Q. Now, going down on Page 13, you indicate Wayne Jones said the same thing. I think he is right.

Do you recall what Mr. Jones said?

A. I don't recall. I would have to go back and read it.

I expect it is in here. Do you want me to do that?

Q. Yes, let's do that.

A. (Pause)Do you want to rephrase the question, or repeat the question?

Q. My question is, when you indicated that Wayne Jones said the same thing, I think he is right, what were you supporting that Mr. Jones had said at the March 4th, 1996 meeting?

A. I think it was the issue of density and [P. 46] putting too many people in a small area.

MR. ARRINGTON: Could we go off the record for a second?

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(Whereupon, a discussion

was had off the record.)

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MS. CITRINO: I would like to introduce Mark McTernan. This is a student working at the Housing Advocates.

MR. KRAMER: In fact, why don't we take a break for a second.

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(Whereupon, a discussion

was had off the record.)

---o0o---

MR. KRAMER: Would you read back the last question and answer, please?

---o0o---

(Whereupon, the preceding question and answer were reread by the Court reporter.)

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Q. Did you agree with what Mr. Jones said as attributed to him on Page 10, and I [P. 47]

quote, "The problem is condensing these individuals in one place like Prange Drive. It just breeds problems. I think it is a legitimate concern"?

A. Yes.

Q. Going back to statements that you made on Page 13, and I quote, "With the addition of this project, it has been suggested it would depreciate values in the Falls."

What were you talking about concerning this statement?

A. I think what I was doing there was echoing comments I had heard from my constituents.

Q. You don't know whether that's true or not?

A. No.

Q. Okay.

A. And I think I made reference to that in my comments.

Q. Now, you also indicated on Page 13, as to what is the impact on Cuyahoga Falls for police and fire.

Now, at this time, you had already gone down to see the Troy, Ohio property; is that correct?

A. That's correct.

[P. 63]

...here, density is not an issue here".

You made that statement; is that correct?

A. Yes.

Q. Do you still agree with that statement?

MR. MORRISON: Objection to the form of the question.

A. Yes.

Q. Going on Page 13 of Exhibit 8, you state, finally, "I said that so many times that I thought why would me or anybody else on City Council advocate anything for this City that is clearly a step backwards, and that is where I made the decision saying We have to oppose this, and we have to oppose it with vigor."

You made that statement, correct?

A. Yes, sir,

Q. In your opinion, why would this development be a step backwards?

A. Again, I was echoing the sentiments of the constituents that were becoming louder and louder on a daily basis.

Q. Do you have a personal opinion whether or not the Plaintiff's project is a step [P. 64] backwards?

A. No.

Q. You would agree that the Plaintiff's project of 72 units is being built in an area zoned properly for that development; is that correct?

A. Yes.

Q. You would agree that your Planning Commission approved the site plan; is that correct?

A. Yes.

Q. Now, it is true that the City Council itself voted to approve the site plan; is that correct?

A. Yes.

Q. But starting on March 18th, 1996, in your official capacity as Mayor, you indicated that you would have to oppose this project with vigor; is that correct?

A. Yes.

Q. And this was made in front of a number of the residents who became the individuals who lead the petition drive to get the referendum on the ballot; is that correct?

MR. MORRISON: Objection. [P. 65] That's an improper question.

I object to the form of the question. I object to the characterization of the question. I object because there are facts contained in your question that are not accurate.

Read the question back. question. Listen to the question.

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(Whereupon, the preceding question was reread by the Court Reporter.)

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MR. MORRISON: Objection, for the reasons I already stated.

Mayor, if you can answer the question, go ahead.

A. I believe it was.

Q. Now, with regards to your statements on Page 13, you indicate that, "'Now, I heard Sandy's comments. I think he is basically on target."

First, were you referring to Sandy Rubino, the City Councilman; is that correct?

[P. 66]

A. Yes.

Q. And what comments were you referring to in that statement?

A. I assume. I didn't read his comments, but I assume he is talking about a lawsuit, and the fact that the City would be vulnerable.

Q. In addition, further down at Page 13, you say a couple things. "If he sues, guess what, we have an in-house law department. Now, they get paid whether they are defending this case or if they are defending another case."

What was the purpose of you making those statements in this setting?

A. I am not sure, but I think it was a reference to the fact that if Council defeated the ordinance, that the City would have the wherewithal to defend the lawsuit.

Q. At the time you made that statement, when you said, if he sues, you are talking about the Plaintiff?

A. Yes.

Q. By March 18th, 1996, you were aware that [P. 67] your Planning Director, Lou Sharpe, had indicated that there was no valid reason to deny the site plan; is that correct?

MR. MORRISON: Objection to the form of the question.

MR. ARRINGTON: Objection.

A. Based on his opinion, yes.

Q. And at that time, you had also been informed by your Law Department that there was no basis for denying the site plan; is that correct?

MR. MORRISON: Objection.

MR. ARRINGTON: Objection. Don't answer that.

MR. MORRISON: For the record, it is protected by the attorney-client privilege.

MR. KRAMER: I believe he waived that because he already testified –

MR. MORRISON: Well, you can take that up with the Judge later. But we are going to instruct him not to answer that now.

Q. Okay. At the time you made that statement, you also heard Councilman Rubino's...

[P. 79]

...Schultz's were there, although I couldn't swear to it. But have popped up frequently.

Mr. Minire, I would assume was there, pretty much the same people who have been in the forefront.

Q. And what was the purpose of this meeting?

MR. ARRINGTON: Objection to the form of the question.

A. I believe the purpose was to organize the referendum drive.

Q. Did you make any statements at that meeting?

A. I am sure I did.

Q. What do you recall you stated at the meeting?

A. There were a lot of questions relevant to the process, the number of signatures needed, timing, a lot of questions relevant to the probable success of the drive, just sort of picking my brain as to what I knew.

Q And you were at this meeting in your official capacity as the Mayor of Cuyahoga Falls; is that correct?

[P. 80]

A. Yes.

Q. By the way, how far away is your residence from the proposed project of the Plaintiff?

A. Five miles.

Q. Okay.

A. I live on the east side, about as far east as you can get in the City.

Q. Were there any questions that you were asked at this meeting at the Prubonics' house, which you subsequently had to call upon anyone in the City to find out the answer?

A. I don't recall any.

Q. Would you say you are fairly familiar with the referendum process as it is in Cuyahoga Falls?

A. Well, I am becoming more familiar with it, that's for sure.

Q. Do you do anything before this meeting to look up the referendum procedure in the charter?

A. Oh, I am sure I did.

Q. Did Mrs. Prubonic, when she had contacted you, indicate that they had some questions about the referendum process that they...

[P. 84]

...after April 1st?

A. This would have been the second.

MR. MORRISON: Objection to the form of the question.

Q. Okay.

A. That would have been the second meeting.

Q. The second meeting would have been Tuesday, April 29th?

A. Right.

Q. At the North Hampton Town Hall?

A. Right

Q. You testified also that you didn't see Buckeye Exhibit 10?

A. I didn't see Buckeye Exhibit I0.

Q. Now, how did you learn that there was going to be a meeting at North Hampton?

A. I received a phone call.

Q. And who called you?

A. I assume, and I hate to use Gerry Prubonic's name, and incidentally, I assume it was her, but it could have been someone else. I was receiving a lot of phone calls at this time as the issue grew in controversy, and my phone kept ringing.

Q. At this first meeting at the Prubonic home, [P. 85] was there any discussion about the name of the organization to do the petition drive?

A. Yes.

Q. And do you know who suggested Citizens for the Preservation of Voter Rights?

A. I don't recall.

Q. Were you involved at all in the discussion about the name?

A. Yes.

Q. Okay.

A. My only recollection is the first name they had, I didn't like, but I don't recall what it was.

Q. Do you know whether or not you suggested Citizens for the preservation of Voters Rights?

A. No, I did not.

Q. Whoever came up with the name, you agreed that that was a better name than the original name; is that correct?

MR. MORRISON: Objection to the form of the question.

A. Yeah.

Q. Have you in any way solicited or encouraged...

[The Following Minutes Appear as an Attachment to the Plaintiffs' Supplemental Brief in the District Court Record at Document No. 173]

CUYAHOGA FALLS CITY COUNCIL PLANNING AND ZONING COMMITTEE MEETING

March 18, 1996

MINUTES

On March 18, 1996, a Meeting of the Cuyahoga Falls City Council Planning and Zoning Committee was held in Judge Hoover's Court Room, the Municipal Building, 2310 Second Street, Cuyahoga Falls, Ohio at 6:15 p.m.

MEMBERS	Mrs. Hummel, Chairman
	Mr. Schmidt
	Mrs. Klinger

Mrs. Hummel called the meeting to order at 6:15 p.m.

The minutes from the March 4, 1996 Committee Meeting were approved as submitted.

LEGISLATION CONSIDERED

An appeal on a denial from the Planning Commission relative to file A-3-96-Z.

Temp. Ordinance A-39 - Approve plan for development - 72 unit apartment complex on Pleasant Meadow Blvd.

DISCUSSION

Appeal A-3-96-Z - Mrs. Hummel stated this is a parcel on Bailey Road near Monroe Falls Avenue. She has given copies of the staff summary and the minutes to the other two committee members. Mrs. Hummel has reviewed these and does not see any new information or reason to send this file back to the Planning Commission.

Mr. Schmidt and Mrs. Klinger concurred.

Mrs. Hummel asked Mr. Arrington to prepare an ordinance relative to the appeal we have received.

A-39 - Mrs. Hummel introduced the Planning and Zoning Committee and explained the format of the meeting.

Mr. Lee Minier, 3404 Prescott Circle, read a letter from Mrs. & Mrs. Suren, 388 Village Court. They expressed their concerns and objections to the proposed federally assisted low income apartment construction. Having attended the Planning Commission and the prior Committee Meeting, they stated there is no doubt as to the serious community objection and disapproval of this project. They stated marginal attention has been given to the additional burden on the police and fire department as well as sewers, roads, and traffic. They were also concerned about the impact to the Woodridge Schools. They also quoted the preamble to the 2010 Land Use Plan and stated the meaning expressed has been misplaced. Mr. Minier added his own comments. He objected to comments made by some city officials, that were part

of the administration, that they believed that eleven or twelve of us were troublemakers and stirred everyone else up. He does not believe all these people showed up because he has a problem. Secondly, he objected to the comment in the Beacon Journal, made by our Development Director, that either we do not understand this process or do not get it. He said, I think we do get it and maybe the city does not get it. We do not want this.

Mr. Steve Boone, President of Buckeye Community Hope Foundation, stated "as you are all aware we are seeking approval to obtain a building permit to construct 72 units of multifamily housing in the 300 block of Pleasant Meadow Blvd. According to your city solicitor, this approval is being sought pursuant to City Charter Article VIII, Section 1.7, which states. "All plans recommendations, regulations, and decisions made by the Planning Commission, which result in approval of request, shall be submitted to and approved by council before the same shall be considered official." On February 21, 1996, we received site plan approval by a unanimous vote of the Planning Commission. This approval was granted due to the fact the land was properly zoned for this development. The development met or exceeded all requirements set forth by the City of Cuyahoga Falls. So at this time we are seeking your approval of that unanimous decision. During the past two public hearings, we have attempted to describe the development in a fashion which accurately depicts the tremendous market need, as well as the quality of our construction. I feel very strongly that our message,

although heard by the residents of Cuyahoga Falls, certainly to date has not been believed. We believe, that the site development review of Council should have limited testimony to site development concerns. This did not occur, so in the spirit of community, once again, I will attempt to address a few of the misconceptions that I feel exist at this time.

Misconception # 1 - Section 8 - Section 8 properties involve a government subsidizing of the rent, the resident on an annual basis only pays his rent and utilities, which are computed as 30% of their annual income. In this development, everyone pays the same rent, entirely out of their own resources. Again those rents are $357 for a two bedroom apartment or $451 for a three bedroom apartment. In addition to these charges residents would also pay their own utilities.

Misconception #2 - Density - The site we will be developing has been zoned by the City of Cuyahoga Falls as R-17. What this means is that the City felt that it was appropriate to construct up to 107 units on this site. We are considerably below that level at 72 units.

This represents 67% of what the City of Cuyahoga Falls decided would be appropriate density for the site in question.

Misconception #3 - Overburden of city resources - We entirely disagree with all such declarations. These issues are zoning related and in this regard this is not an appropriate forum for such discussion, since our development already complies with Cuyahoga Falls zoning ordinances and its requirements.

Misconception #4 - School density - Again we fell this is an issue that should have been deliberated when the land was zoned. It has been reported that a consultant projected that "42 students would be coming from the area", we question this study and suspect that such a claim could be extremely misleading. For example, what is meant by this area? Will other areas under produce students following development of their area. In addition, our experience has shown that although not marketed to the locals exclusively, 80 - 85% of the additional residents, who occupy the housing come from the local community. With this in mind, it is difficult to believe that a large percentage of the children, who will reside at the community do not already attend school in Cuyahoga Falls.

Misconception #5 - Increased traffic - Again, this is a zoning issue and that should not be addressed when considering site plan approval. However, we find it curious that a 92 unit development received approval by this council a few years ago. 92 units would most certainly produce more ears than 72 units.

Misconception #6 - Ability of school bus to turn around - The City's Fire Chief feels that a fire truck can adequately turn through the property. So unless your school buses are larger than your fire trucks, it is our opinion that this concern is resolved.

Misconception #7 - Retirement community vs. family community - The fair housing act 42-US-3601 states that it is a violation of the federal fair housing act for any person including a municipality, to make

unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin. In addition to that Ohio Revised Code Section 4112:02H1 states that it is unlawful and a discriminatory practice for any person to deny or make unavailable housing because of race, color, religion, sex, ancestry, handicapped, national origin or familia status.

In summary, we feel we have the legal right to proceed, and we are at this time requesting to council to not delay our efforts any longer. We understand the tremendous pressure the community has brought to bear upon you as elected officials. However, please remember the voters that placed you in this position of trust, places you in that position to do what is legally right for the community, not what happens to be popular. Thank you very much."

Mrs. Hummel stated she had talked with Dr. Clapp and the school bus would not be coming down Pleasant Meadow Blvd.

Mr. Roy Lowenstein, Vice President for development with Ohio Capital Corporation for Housing, stated Ohio Capital is working with the grant and bank financing. Ohio Capital has invested in 40 projects around the state. Ohio Capital will be around for 15 years assisting management and making sure the site is in compliance. They feel there is an overwhelming need for this type of affordable housing and that this site is suitable for development. He stated this is your community and we cannot tell you how to solve this problem, but you do have a problem. The

rules have been stated in a zoning code and a negotiation process with the city staff has shaped the project in a positive way. You now have a development that meets or exceeds all the zoning requirements of the City. If Cuyahoga Fails is to be guided by the rule of law, rather than simply by popularly held fears, then it is up to the Administration and City Council to be leaders and to tell the truth to the citizens that they as a community cannot act in a discriminatory manner.

Mrs. Patricia Bryan is concerned about this community not other communities. She does not feel Cuyahoga Falls has been discriminatory in any way shape or form toward housing for anybody that wants to live in this town. If you can afford to live here their is housing available for you. We have got our ghetto. We have got our low income housing. This project is already being called Pleasant Ghetto. People are already calling it that.

Mrs. Hummel stated I have not heard it called that Mrs. Bryan.

Mrs. Bryan stated, "Well, I have quite a bit and it is not funny. You know I do not want that in my community any more. We already have enough of that. Thanks."

Mrs. Shirley Matuska stated we have a Home Builder's Association in the Akron area. If this is such a wonderful area to build this type of housing why in the world did somebody have to come from Columbus to do it?

Mrs. Jerry Pribonic stated, that she did not agree with Mr. Boone's comments that this is political or that we are here out of fear or that we were ugly to him. She stated the area would be to crowded. She also stated, "I do not see that our school system is correct for these children, that would be there." She resents people coming in here and saying that all these gracious intelligent people are mean, ill-tempered and have fears.

Mr. Larry Hart stated he would be directly impacted by this development. He feels that the kids will be running through their development.

Mr. Frank Santos does not believe the Planning Commission took into account that most of his development was senior citizens. He feels, that the peace and quiet of their development will be changed.

Mr. Don Bridenthal asked what does the legal department say since the last meeting.

Mr. Arrington stated basically what you have in front of City Council tonight is a site plan review. The plan will either be approved or disapproved based on the site plan. We have not received any request from City Council for a legal opinion.

Ms. White stated she would like to request the legal opinion. In relation to the Mayor's letter that we received dated March 13, 1996. The Mayor seemed to be suggesting that we reject this proposal, but on what legal basis, if any? That is why I am asking for the legal opinion.

Mr. Arrington asked that the request be made in writing.

Ms. White stated she would put it in writing.

Mrs. Beverly Smith has concerns about Mr. Boone's statement about the enrollment projections. With this large influx of students coming at once she questions where the additional tax money is going to come from. She feels it will come from all of us. She stated that Mr. Boone said we did not hear his comments. We did hear, however, we feel he was not very straight with us. She feels that the citizens do have a right to oppose this development.

Mr. Don Hinson asked if Mr. Boone would withdraw his application for approval of the project.

Mr. Boone stated, no he would not.

Mr. Tom Allio - (The following is a copy of the letter handed to the Clerk by Mr. Allio titled "Remarks of Tom Allio, Cuyahoga Falls City Council, March 18, 1996 which he read)

Thank you council for giving me this opportunity to make some brief remarks about the Buckeye Community Hope Development. I am Tom Allio. I am a resident of the 7th ward in Cuyahoga Falls and I serve as executive director of the Catholic Commission. For nearly 25 years, the Catholic Commission has served Summit County as the official social action arm of the Diocese of Cleveland. The Commission is involved in a wide range of public policy issues on the local, state and national level. In

addition, we have formed some 18 non profit agencies like the Akron-Canton Regional Foodbank, ACCESS, an emergency shelter for the homeless, the Good Samaritan Hunger Center and the Summit County Housing Trust Fund.

As a resident and in my capacity with the Catholic Commission-I would like to say that there is a need for the kind of high quality, low cost housing that is proposed by Buckeye hope. It would be an asset to our community. For instance, there are thousands of current Falls residents who would be eligible to reside in Pleasant Meadows. There would be people you would know who you might not expect would be income eligible for this development. Fire fighters just starting out in the Falls make $26,328. Some of them could be eligible for Buckeye Hope or how about the men and women who serve our city on the police department. Starting salaries for police officers are $26,540. The librarians who serve the community at Taylor Memorial Library start off at $20,779. They might welcome the chance at finding a decent place to live with rents that are far below the median rents in the Falls or how about the young mother with three children who is a starting teacher in the Woodridge School System, making $23,576 a year she would probably jump at the chance to move to Pleasant Meadows. These professionals and others like them serve our community well. Let's not close them out.

They all have names and faces. They are not just uncontrollable children, and noise makers who are going to make our streets congested or overload our

school system. No one should be concerned about there self esteem or whether someone is going to label them as a residents of Pleasant Meadows. The point is our community is enriched with people of different economic, social, cultural and racial backgrounds. It is a healthier and more vital community when it reflects such diversity.

Council knows the truth about this excellent development. You know that most if not all of the issues raised are false and do not merit your voting down this project. Council, I understand that for many of you this is a difficult decision. I respect the pressure you are under. But, sometimes leadership calls people to do the right thing not the expedient thing. It calls for leaders to make principled decisions rather than political ones. To act courageously when there may be great risk. Thank you for allowing me this opportunity.

Mr. Willett, the Dales, stated they moved there because of Woodridge Schools. Will they go to Cuyahoga Falls or Woodridge Schools?

Mrs. Hummel stated the children will be going to the Woodridge Schools. The problem is the number of students is higher than the projected number Woodridge consultants came up with a few years ago.

Mr. David Willett stated he has a problem with the different numbers being thrown around. He estimates it will take $150,000 extra for teacher's salaries and they are only paying $30,000 in school tax. He also questioned rent figures and income amounts.

Mr. Lowenstein stated the income eligibility numbers and the way they are computed.

Mrs. Santos, Prescott Circle, asked what tax base would the development generate and could they build single family homes?

Mrs. Hummel stated the tax to the schools was computed at around $31,000 and they have R-17 zoning and they plan to develop at this density.

Mr. Thomas Lee, 3512 Prescott Circle, said he is concerned about the drugs and drinking in this section.

Mrs. Hummel stated she did not feel that was pertinent. We do not even know who is going to be living there yet.

Mr. Lee stated what about the noise factor. "I would rather have the gun club there". He stated when they get that boom box going it will be loud. He feels that these gentleman are here to set us up for a lawsuit, from the comments that he hears.

Mr. Rubino stated "I am going to be very honest with you folks. My name is Sandy Rubino, I am a Councilman-at-Large, that means that I represent you and everyone else in Cuyahoga Falls. I have been wrestling with this issue for two weeks and I have not gotten a lot of sleep. I am tired - O.K. I have looked under every rock in your behalf, and other members of council have too. I heard, that we might have wetlands out there. I spent the better part of a week exploring whether we have wetlands. To see if that is a

legitimate site plan review issue. Turns out that it is not true, there is about 4,000 square feet out there, and you need an acre to constitute a wetland, that is federally regulated and protected. Because I am an attorney, I have looked at the legal issues too. I cannot hide as an officer of the court and a lawyer, from what I believe the truth is. So, what I am going to tell you tonight is what I perceive to be the truth plain and simple. This project is before us on one simple issue, a site plan review. A site plan review allows us to look at whether that project is within the zoning that is already been enacted into law in the City of Cuyahoga Falls. We are not allowed in my mind, unless a legal opinion from the law department tells us otherwise, and I am anxious to hear what the law department has to say. But, we are not allowed to know if there is going to be 100 kids there, 50 kids there, it is not pertinent to the issue of whether that particular construction project meets our zoning requirements. Our zoning requirements have nothing to do with how many kids there are. Our zoning requirements have nothing to do with whether people drink, whether people smoke, whether people shoot guns, whether people do anything. We only have one thing to look at. I thought to myself, you know Sandy, your kind of a home grown politician, you spent your whole life here. I would hate like Hell to have to look you all in the eyes and vote yes for this project. But, unless I hear something to the contrary from the law department, I do not have any choice. I am being honest with you and it breaks my heart, because you are good people and you deserve consideration. You deserve to have

your opinions heard tonight and in the past. But, I know deep in my heart what is coming. Somebody mentioned that somebody was setting up a record for a lawsuit. You know what, I am a lawyer, I have been in trial courts for twenty years and you are probably right. I have been getting letters and I have seen the comments in the Beacon Journal. I have seen and heard a lot of things. I know when a record is being created for a court of law and I believe a record may be being created here. So, all your comments, when this City goes to court someday, if this is turned down, about children and all this other stuff are not going to mean diddley, unless somebody proves me wrong or offers something to the contrary. Now the Mayor has proposed something in a letter, it has to do with the preamble. I would like to hear more about that. I suppose we will get something from the law department. Ten weeks ago, I took an oath that I would uphold the laws of the United States, the State of Ohio, and the City of Cuyahoga Falls. It is one thing to be able to say, the Hell with the law, l am going to nullify it because I do not like it. l have got deep reservations. I am not sure in my heart, that sociologically maybe where there coming from it is the right thing to do. And I know that somebody somewhere is going to make money off this. Whether it is tax credits or something else. I know as a community we will have to pick up the slack because it is not single family homes. But, I am an officer of the court and I am telling you folks the truth, unless somebody can tell me to the contrary, I do not think, I have any choice but to vote yes. If we get sued, and I

am sure we will, are we willing to spend (and I am just going to throw out numbers) one million or two million just to fight the inevitable and have them build it anyway. That is what I have to worry about as a Councilman-at-Large. Are we going to spend a million dollars fighting something that we know is eventually going to be built? This has nothing to do with whether the project is proper. This has to do with whether these folks have the proper R-17 zoning. And I am going to tell you that it is zoned R-l7. I said it a couple weeks ago, that it is amazing to me that the land in that area has not been preserved for the people of Cuyahoga Falls as a trust. And I still would like to see those other two sites kept as an arboretum protected for the people of Cuyahoga Falls. In my mind it is too pretty to do otherwise. Folks, I hope you do not hate me, I am just telling you the truth as I see it. And unless I hear something from the law department otherwise, I have no choice but to vote yes on this."

Mrs. Debbie Rich, 24th Street, said what you are saying is that legally they have every right to do this. That is well and good but does that mean you guys are just a bunch of puppets. You cannot do anything for us anyway. If you vote no, does that mean it does not happen?

Mr. Rubino answered, if we vote no we will be sued. We will probably pay not only our attorney's fees, their attorney's fees, we will pay damages for any delay of the project. There is a lot of things that we could pay for. And I have to ask myself, am I willing as a Councilman-at-Large to risk all that, to risk a million

dollars let's say, when I know something is going to happen that is inevitable.

Mrs. Rich said I understand, but you guys work for us and this is what we want. If we get sued somewhere down the line, fine, if we do then we fight about it then.

Mr. Rubino stated you know what I have been studying now for two weeks, myself. He stated he has found no way around this. If someone knows a legal remedy, tell me, I am all ears. "I represent you folks along with the rest of the City and I take that very seriously and I cannot in good conscience vote for something that I believe violates the law. I do not have that luxury."

Mrs. Rich stated I understand that, but you have to understand whoever is my Councilperson, I pay his salary. You are paid to do what I want. That is why we are all here. What we are saying does not make any difference? Why waste the time?

Mr. Rubino stated "I agree with you, if this were something that I had flexibility in like zoning - like whether we should zone this R-17, R-8 or R-1. I could listen to your concerns and say yes, your right, let's zone this R-1. However, this has already been zoned. The City has already zoned it.

Mrs. Hummel stated "let me explain something. We have an active application on a zoned piece of property. The application fits the zoning that is currently in place. We cannot legally change the zoning out from underneath an active application.

This application is what we are talking about right now. We cannot when they have already applied for something that they have the legal right to apply for, based on an active zoning that was in place. We cannot change the zoning out from underneath them. No court would uphold that."

A lady stated what about the tower?

Mrs. Hummel said what tower? I do not know which tower. There are two towers out there. Are you talking about the Blossom tower or the City's tower?

The lady said the City's tower.

Mrs. Hummel stated "The City's tower will be sited somewhere. Hopefully it will be agreed upon by everyone. There was an outcry by the residents in Ward 8 that they did not want it in Keyser Park and I think the Mayor has pretty much promised that it would not be there.

Ms. White stated "I am Debbie Rich's Councilperson. I respect your opinion and I would like to tell you something. I will represent you and do everything I can for you within the limits of the law. Most of the people in Ward 3 know that. Referring to Sandy's comment the question is really, are we to be expected to reject this project, be sued, which we will be. Mr. Boone has already flatly stated he would sue us, and then we would pay the price for losing that suit, a suit that we are likely to lose. If it is millions of dollars, my people in Ward 3, through their tax money are going to pay for that. That is really the issue and I can attest to the work we did on this. The three of us,

Mr. Rubino, Mr. Wagner, and I were out trudging around in about seven inches of mud. Shooting those pictures over there to try to establish this as a wetland. Just to get any legal shred that we could hang onto so that we could reject this project. We really mulled this over for a long time. This is very difficult and I am heartsick about it also. I would rather see it go another way, but I agree that rather than spend the money to fight a law suit that we do not have much likelihood of winning. We might want to spend the money negotiating the purchase of the adjoining land so that this situation over there is not further exacerbated.

Mrs. Reese stated "I think all of us have been torn by all of this. Everything that you said two weeks ago really did get my heart. It really did affect us. We have been mulling over this and I know some of my colleagues have taken it several steps further. I am thanking you for your letters, your thank-you notes, your admission that this is indeed a dilemma for us. I think what this has really brought to the floor is how important it is to review the land use. We really need to look at the way we are planning. I do not think we can go back. I know we cannot rezone this thing. But, we can look at what remains and with that maybe envisage something maybe better.

Mrs. Jenkins, 3474 Prescott Circle, stated what we seem to be doing here is locking the barn door after the horse is stolen. How many horses are going to get out before somebody builds a better barn. It is up to you that are in front of us here, because the Falls, as it was several years ago, was delighted to get what we

fondly called Northampton Township as part of the City of Cuyahoga Falls. In general, it is not been a bad deal. I think that Ward 8 is right for all kinds of development. Hindsight should tell all of you who have the power to do this, that unless you want to fill the chambers again and again in future years, you need to take a look at the remaining land in Cuyahoga Falls. There is not unlimited space. You need to decide what would be good for the whole community to do with that land. Otherwise, this is going to repeat itself and everything that comes along is going to be put in Ward 8. I do not understand how Mr. Boone found this obscure piece of property. It is very unpleasant to be one of four hundred voters, who live in Cuyahoga Falls and find out you have no power and no say.

Ms. White stated I just want to say that at the last committee meeting, we did officially request that the administration revisit the Land Use Plan. And we are hoping that, they are working on it and that we will have an active part in it this time.

Mrs. Hummel stated Mr. Boone responded, two weeks ago, that a Realtor from this area called them and made them aware of this property. Is that correct?

Mr. Boone stated, yes it was last Spring.

Mr. Hummel also stated, she would like you folks to know that this Council has been aware of this project for about five weeks. She stated she went through Mr. Sharpe's file on this and the City first learned of this project in a letter dated June 28, 1995. That letter was addressed to the Mayor. So this project has been

known about by the administration since June of 1995. This Council found out about it five weeks ago.

Mrs. Shoults, 3489 Prescott Circle, stated she would like to ask Mr. Boone if he chose the site and did he consider it was next to a retirement community. She stated she lived on 25th Street before and there were lots of kids. She is sorry now she left there. She stated we do not want this, you have made us very unhappy.

Mr. Bill Fenchel Jr., 3306 Kellybrook, stated "I believe the Council here has three choices. #1, you can vote for it; #2, you can vote no; and #3, we are on the verge of opening up Pandora's box. I believe we can take a little step back and look at the situation and investigate what the real law is, investigate what all of our options are and investigate what we have to do. But if you feel tonight, that you have to vote one way or the other for this it is to soon. I saw the National park, through eminent domain, take the whole Cuyahoga Valley. Maybe, there is an option there. We are the government, all these people in here. It is time we looked at all our options before opening Pandora's box.

Mr. Hinson asked if there is any time frame for the project to get its funding. Also he heard the tax credit program may be discontinued in two years.

Mr. Boone said $125,000 from Summit County is dependent upon a June 1, 1996, building permit and breaking ground. The other funding requires that they complete the project by the end of 1997.

Mr. Lowenstein stated there was a proposal to sunset the program by the end of 1997. However, Representative Archer has withdrawn that proposal.

Mr. Ron Baranchik, Pleasant Meadow, questioned heavy equipment being on the site and possibly altering the drainage. He suggested that the wetland area may have been greater before that. He stated he hears water running into a broken catch basin all the time.

Mr. Rubino concurred that he has seen the drainage problem, the high water table and the bulldozer tracks.

Mr. Sharpe stated he was out to the site with the Summit County Soil and Conservation Service. They said there is about 4,000 square feet that may or may not be a wetland, but less than one acre. One acre or more is covered by the Army Corp. of Engineers so it does not qualify as a jurisdictional wetland.

Mr. Dale Zimmerman asked about a land use plan dated 1970 that shows areas that are designated marginal use land area. Is this piece of land part of that marginal use?

Mr. Shape believes the plan was created by tri-county planning for Northampton Township. He stated the marginal areas referred to floodplain and steep grade areas. He did not feel the site was marginal use.

Mrs. Hummel asked Mr. Sharpe if he would have Mr. Ross provide us with a written report of what he saw out there today.

Mr. Sharpe stated, yes he would.

Mrs. Louise Khoury, Ash Lane, asked what I do not understand is that if the Mayor knew about this in June of 1995, how come Council did not know about this until four or five weeks ago?

Mayor Robert answered Mrs. Khoury, "Well, let me say we did get a letter back in June indicating a desire to do this kind of thing. By then, as somebody else mentioned, the cat was out of the bag because the zoning was already in place. R-17 has been in place actually in a varied form long before the merger even took place. It was R-3, but the conversion to R-17 was the equivalent. So, by then, if the term the cats been out of the bag, the cat was out of the bag even before we got any notification. And, quite frankly, we do get letters of a perfunctory nature like that rather often and we do not pay a lot of attention to it. Let me just say a couple of things though. Because, number one, I do not think the zoning is the issue. Everybody points to the zoning and says it's the R-17, it's the R-17. The issue is low income housing. That is the issue. Council just passed, a week before this came for review, an identical situation over in Ward 1. A 92 unit project, there was no outcry, there was nothing. The difference was it was not low income housing. That is the whole issue here. Density is not an issue here. Let me point out who the culprit is in this thing. I do not want to make this political and I am not going to make it

political tonight. The culprit goes back to 1991, when House Bill 339 was passed through the Ohio House. That is what set up the authorization on this. That is what set up the Ohio Housing Trust Fund. That is what created this. It would not matter how much R-17 we have in the City, because there are plenty of others, as somebody else indicated. If it is there and this thing becomes a vehicle somebody is going to come in and seize it and they are going to build on it. We can rezone everything out of here which hopefully we will be taking steps to do. House Bill 339 is what has created what we have here today. And I think as I look around this room and I see Frank Averill and Bill over there and Jerry Pribonic and a lot of other good people, the issue is that we have got people here that have built homes, condominiums, single family homes from 130 to 150 thousand dollars, and simply they do not want people moving in their back yard, that are going to be renting for $371. That is it in a nutshell. Now you can cut it any way you want, but that is to me the issue. So, where are we at. I want to thank Jerry Pribonic, she mentioned that we talked several times and we have indeed. The one thing that I keep remembering is that I said to her over and over again in meetings is, Jerry, it is probably not going to be as bad as you think it is. Finally, I said that so many times that I thought why would me or anybody else on City Council advocate anything for this City that is clearly a step backwards. And that is where I made the decision saying we have to oppose this and we have to oppose it with vigor. Now, I hear Sandy's comments and I think he is basically on target, I think he is an

attorney and he recognizes and I mentioned to everybody here two weeks ago, that the city is vulnerable to a lawsuit. There is no hiding that fact, as a matter of fact, Mr. Boone has as much as said that. But, that does not mean we rollover. We do not know, I mean, we are all sort of sitting here predetermining. We are saying, well if we oppose this, if we vote it down, which is what I recommend all council do, then Mr. Boone is going to sue. Well, first of all, we do not know that. We just assume he will. We do not know that. He may, as somebody else suggested, say, hey, I got this June 1st deadline and you talk about complexity the term Mr. Lowenstein used, the complexity of the rules. Well, we have all been struggling with the complexity of the rules. Does anybody know what the complexity of the rules all entails. I certainly do not. I have been struggling with them, the law department has been struggling with them, everybody has been struggling with them. So in terms of us trying to ascertain what will be the next move, I do not know what it is. I am not sure, Mr. Boone sitting there knows what it is. But, the reason I recommend that we turn this down is because then the ball is in Mr. Boone's court. Will he sue? I do not know. If he sues, will he win, we have all sort of rolled over on that one haven't we. We have said if he sues, certainly, he is going to win. Why? A couple things we know, if he sues, guess what we have got an in house law department. Now they get paid whether they are defending this case or if they are defending another case. Now, I am not going to pretend that we would not hire outside counsel. We may very well do that or

we will try. Of course, that will be up to City Council to decide whether they want to pay for that or not. We may use the option of going to an outside consultant, I do not know. But, we do know we have a law department to defend a lawsuit. Now, I would doubt Mr. Boone has an on staff law department to file a lawsuit. Which means what? He has to spend dollars. Well, if he has to spend dollars then he has got to make a decision as to how long does he want to pursue this thing, given the fact that we all know that somewhere along the line there is a deadline. I'll just conclude by saying it is complex, it is difficult. We have all spent two nights at least looking at who to point the finger at. I do not think we should be into finger pointing. Whether it should be R-17, whether House Bill 339 should have been created, whether someone tipped off Mr. Boone and he came in here from Columbus. You know those were all sort of ancillary to me. The issue is we have got to make a decision based on what is right for our community at this point in time. I think you have all spoke loud and clear and as Mr. Rubino said we represent all of you and you all said you do not want it in your backyard. I have advised Council, in my opinion, we should reject the thing. Let's go to court, lets see what happens. If we win, hallelujah, then we do not have to put up with it. If we lose then we have given it our best shot. And I would again plead that council do that."

Mr. Lee Minier said he had lived in Cuyahoga Falls his whole life. He has invested all the money he ever made in this town. He also stated he is very disappointed and feels we have dropped the ball. You

have disappointed a lot of people. He feels the people do not have a way out.

Mr. Richard Seaver wants to know if the zoning makes a difference. He wants to know why the zoning was not changed after the last failure. He also wants to know what guarantees do we have the zoning will be changed if this fails.

Mrs. Hummel stated Mr. Sharpe said this type of development could be built even on R-8. She stated we made the request two weeks ago to take a look at the land use plan especially to look at the parcels we need to rezone especially the gun club and Mr. Daily's.

Mrs. Beverly Smith asked Ms. White if Ward 3 is in the Woodridge School system.

Ms. White answered part of Ward 3 is in the Woodridge Schools.

Mrs. Smith stated you mentioned that your constituents would be paying for the lawsuit, if the lawsuit occurs. She stated that 100 new students from a small system like Woodridge is nothing to make light of. Our taxes are going to be raised to pay for this.

Ms. White stated, "I understand that. My actual point in mentioning that, Mrs. Smith, was that I think it is irresponsible for the administration without a legal opinion from our law department to recommend that we reject a project on no other basis than just public protest. Although, I know how important that is. And I have responded to it myself, in my own ward. We are looking at a legal basis here. The Mayor may

not care if we get sued or not but some of us do. And it could be very costly. I do not buy the argument that we have attorneys working in the law department who can do it for free and Mr. Boone has to pay for legal. You pay for it to in those attorney's salaries and everything else that happens in that law department. That was my point. I would like to have a legal opinion from that law department to show me what the administration's legal position is. There must be case law somewhere, Sandy, I do not know if you will agree with this, on cases similar to this one to see what our likelihood is of winning this law suit. I feel that is the responsible thing to do."

Mrs. Smith stated "Well, first of all, I think I am, as we all are, appalled that Council did not know about this prior to when you stated. I feel like we have been betrayed by the Administration. Voting is tomorrow, I know how I am going to vote on any new additional taxes until I find out what is resolved in this matter. I am very concerned about my taxes and the Future of the school system, as well as our property values. I am very upset by this and I hope you will all do your best to find some legal basis to reject this."

Mrs. Harrington asked Mr. Boone what were the concerns in Troy, Ohio? She wants to know do the people have the same concerns today.

Mr. Boone stated that the only complaint he has had from the city of Troy was concerning a light shining in someone's yard.

Becky DelPropost, Pleasant Meadow, stated there was a lot of digging across the road there. There was a lot of equipment there for weeks and there are exposed drain pipes. The site looks a lot different than it did a couple of years ago. She also asked who is going to serve the area as far as water and sewer.

Mrs. Hummel answered Summit County for both.

Mr. Boone stated the reason for the equipment was that they have to determine if a site is buildable. We do that by hiring an engineering firm to do test borings. He imagined that is who was out there.

Ms. White asked how many test holes were dug there.

Mr. Weatherby, the architect, stated there was a least one test hole dug for each building and two for some.

Ms. White asked what would be the reason for bulldozing.

Mr. Weatherby stated the only reason for a dozer would be to pull the boring rig in and out. He stated the problem with the site is the condition the former builder left the site in when he left.

Mr. Pribonic stated there was a boring machine back there about five weeks ago. He asked who would pay water, sewer and trash.

Mrs. Hummel stated it is paid in the rent.

Mr. Pribonic stated his taxes have gone up and he feels that taxes on this development should be much higher.

Mr. Bill Fenchel asked how far does Mr. Boone live from the nearest development like this one.

Mr. Boone stated he did not know, however he would be happy to measure it for him.

Mr. Shoults asked who is the contractor on the project and are they local or from Columbus.

Mr. Boone stated they have not chosen a contractor. There were five firms bidding, two from the Falls, one from Hudson, one from Willoughby and one from Columbus.

Mr. Wagner questioned Mr. Pribonics figure of 10,000 cubic feet of water per month for a family. He feels that figure is about six times the average family usage

Mr. Velo asked what is the average stay of a resident in one of your condos.

Mr. Boone stated it is about two years.

Mr. Velo asked do they then move on to home ownership.

Mr. Boone stated, yes sir, they usually do because it gives them a chance to save some money.

Mr. Velo stated why don't we start there. Why don't you offer it as a home ownership rather than as a rent.

Mr. Boone stated it is too late to do that at this point.

Mr. Velo stated, "you know what I know, it is not a Section 8, but Section 8 has failed. The people who are in there, they have just stayed there and they are proud of the fact that many generations have stayed there. And I do not know if these federal mandates we have are doing them any good. And I for one could have qualified for these as a young teacher. I for one was too proud to go over there. I told my wife I do not want to live there. I worked two jobs, and I am sure many of you did too. I worked with so many people's parents here. Mr. Muster, Mr. Blind, Mr. Santos, I worked with your brother. I am inclined to go along with the people that I work with and live with. You mentioned a market need. Well, that is way less than the community acceptance here. I can see that. I do not know if personally I would want to go where I was not wanted. I would not go personally. If I am not wanted I just tend to stay away. That is my personality. Are you here for the money? I am sure that has something to do with it. Are you here for the needs of the poor? I am sure. But, I do not know if we are really servicing them well. Many of these properties that we have seen the only way that you can clean them up and get out the crime, is to let them become part owner. They start policing the area themselves when they see that they have a genuine ownership. Which is what all of us have in our own personal property that we bought through the years. We have gone from cheap ones. I know that my last car cost more than my first house. I did not think that I ever could say that,

much less that I ever could afford it. And as times have gone by increases and working hard, I am glad that I did not take that first step. I would still have that mentality that I want to stay there. And I would like to see the federal government put, I wish they would, put that on the sunset review and eliminate that. I wish they would do that. Not that I do not want the poor to have a nice place to live but that is a dilemma too. All your concerns are good. All Sandy's concerns, legally it is founded. I do not know if we will spend that kind of money. Whether we should do it, I do not know. I just wonder at the next level are we really doing anybody a justice by offering them something that they really have not worked for. I could not afford a place like that when I first started teaching. I had to borrow money from my daughter's piggy bank to make the down payment at 5%. I am sure you all have similar stories. But, I just wonder what good we are really doing. Would you people really object if it was not low income housing?"

A lady stated yes, she still objected because it is going to be right in our back yard. There will be lights shining in our windows and kids running around in our yards.

Mr. Velo stated, "I do not agree with that argument, I just do not know if this is the right way. I think maybe a way to solve it would be to offer them ownership. You say it is too late, you cannot do that, but why not? There is alternative financing. There are things that you could do as the owner that would incite ownership rather than rent. That I think would

promote a better neighbor for these people, I am inclined to go along with people in the community.

Mrs. Nancy DiSalvador, Wyoga Lake Road, stated we all have the same concerns. It looks like our three acres will be the playground. There is not a tree or anything between us. She cannot understand why anyone would want to build where nobody wants you. And what is so important about those six acres? You could go anywhere else and get land, why there?

Mr. Minier state, "I do not think the issue of low income housing has ever been the issue with me. I know it has not been the issue with the people that worked on the committee. Sandy said he spent a lot of hours at it, so have we. We really do not want that there."

Mrs. Kathy Hinson, The Dales, stated she lives in a single family home. Having this multifamily dwelling in the heart of single family homes and condominiums simply is not conducive to what she thought the Falls is all about. This is not what she envisioned this area to be develop as she envisioned more single family homes. She stated it is not the children because in her area there are a lot of children. She stated this was not the lay of the land when she moved over here and she does not know if she will stay.

Mrs. Beth Jones lives in Prescott and she and her husband are both in their thirties. We pay taxes in this community and I do not think this is conducive to our community. She said they are not paying taxes like those my husband and I pay. And it really bothers her.

Jennifer Waite, Prescott, stated she is twenty-four and she is concerned about property values. She and her husband will some day move and they are concerned will they be able to sell their house with low income housing right behind us.

Mrs. Hummel stated the only way she could respond to that is we certainly cannot predict what is going to happen to your property values. That is your view and your certainly entitled to it.

Mr. Tom Conti, North Haven Blvd., asked if the plans have already been approved by the City.

Mr. Dzurilla stated the developer must submit plans for a building permit. At that time there is a city wide review of the plans for compliance with all building codes and city regulations. Those plans have not been submitted yet.

Mrs. Leslie Conti asked is there a way that those plans could be turned down.

Mrs. Hummel stated, "her understanding is that when you meet all the requirements to build a building, they will be approved. There is not basis on which to turn them down. They are not going to submit something that is not acceptable building standards. Building permit process is not a public forum. Just like if you wanted to build a house on a piece of property you owned. You would bring the plans down. There would not be any hearing like this. You would just go and get it approved."

Mr. Rubino stated, "a couple of weeks ago I brought up the prospect of making an arboretum down in that valley. I would just like to know what the consensus is among the people out there. Is that something that you would be interested in us doing, yes or no?"

An overwhelming majority applauded and said yes. (Clerk's observation)

Mrs. Hummel stated, "We have heard from the public for two hours now. I appreciate everyone's demeanor. Some of the things we have talked about have been very wide ranging and may not be right on target as far as what we are about here as far as this particular ordinance. But, I appreciate everyone's politeness and being willing to listen to everyone else. We do appreciate what you have to say. Some of us have not made up their minds yet.

Mrs. Klinger stated, "I would like to see the committee bring this out without a recommendation. We will do it pending the written legal opinion from the law department."

Mr. Schmidt stated, "I would like to respond to a number of things that have been said here this evening. I have not been swayed by Mr. Boone. I still intend to vote against this when it comes up for a vote. I have several thoughts about that, that I would like to share. In this day and age we do often times try to demonize issues in politics, nationally or whatever. The Mayor talked about Americans with Disabilities Act and talked about busing. I want to tell you the

Americans with Disabilities Act is a great law and it allows access to people with handicaps and it is a wonderful thing. It has cost money. It is probably something that should have been done a long time ago, but it is good. Busing did not seem to work. Public housing in many instances has been very successful in allowing people to rise above their particular circumstance. So, to blame Washington DC or Columbus, Ohio for what has happened right here in our city hall is not a good thing to do. And it really does not help shed any light on this issue. I think that most of the people in this room are concerned with the difference of this kind of development as opposed to what, as I have said before, is a very quiet almost retirement community. And that is the main problem here. It is not that we are not tolerant people here in Cuyahoga Falls. I almost want to tell you that I grew up in a log cabin over on the east side of Cuyahoga Falls, but we had a very difficult time and we struggled to survive. So I am very tolerant of people's struggles and I am very sympathetic, so it is not about that. It is just that it does not fit in that area in my opinion. Another issue that I would like to talk about is the fact that Mr. Boone has threatened to sue us. Mr. Boone, I have got to tell you I do not accept threats very well from you or anyone else. I am sure you are very well intentioned. And I am sure the Catholic Commission and everybody else is very well intentioned. I do not question your intentions. But, it immediately wrangles me to be threatened to be sued by a developer. And I went through this same situation. A developer threatened me and I did not budge and I was sued and

I won in the Common Pleas Court and I won in the Appeals Court. And for us to act, to vote, based on a threat from someone who comes into this room and threatens to sue us is absolutely wrong. We cannot operate as a Council in that manner. We have to draw the line somewhere and stand up to people that come in and try to do that. Lastly, we have three branches of government in the United States. We have the executive or the administrative, we have the legislative and we have the judicial. And those provide for checks and balances, as provided in the Constitution, by the founding fathers. If one branch of government makes a mistake then it is up to another branch of government to correct that mistake. So I think what you see here is democracy in action. We have the right, I believe, to vote our consciences based on feed back we get from the citizens. We are not computers sitting up here that you feed information into and it spits out an answer. We are permitted to cast a vote based on what our constituents are telling us. And if there have been mistakes made by past councils or by an administration, we have every right under the Constitution of checks and balances to correct that mistake. And then if someone feels they have been wronged they can take it to the judicial branch of government and the judicial branch of government determines the final outcome. And if that needs to happen in this case, then so be it. So I will be voting no on this and I would urge my colleagues to vote no as well. We have to listen to the people who are in this room tonight. And I have cast votes in the thirteen years I have been a member of Council that have been

very unpopular to some people. I voted for Twin-Value on Howe Ave. And I am still to this day receiving flack. So, it is not that I am afraid to cast a vote that might be viewed as unpopular. I think that we do need to listen in this instance, to all the evidence and to the people who live in that area now and to not succumb to threats of a lawsuit by Mr. Boone from Franklin County, Ohio. And I urge all my colleagues to vote no. Thank you."

Mr. Bedell stated, "I guess I would just like to follow what Mr. Schmidt just talked about and that is lawsuits that are generated by developers at this level. As it exists right now we heard comments from citizens that are in the area and comments form Council, Mr. Rubino in particular, as to what ramifications would take place. The oath that we took to do what is Constitutionally correct, to do what you want us to do, we have to do right. If it is written, as it is today, if all the conditions are met, the developer can say hey!, I met them, by law I get it, I can put that thing there. Maybe we have to change that. Maybe we have to say, lets put something in there so we can say something. It just seems like there is a frustration, there is a wall. You are trying to help, you are trying to help us and everyone is trying to do right. That does not exist today. The developer can come in and say I am doing everything I am supposed to do and if you do not let me do it, then I have the right to sue you. That needs to be looked at. We have to consider everything that has been done up to this point. I guess there is at least one question that I have for Mr. Boone. Is the 72 units cast in concrete?"

Mr. Boone answered, yes.

Mr. Bedell stated, "I know as a council representative, I have been taking notes, gathering information and I have not made a decision to vote yes or no on it. But come time to vote on it, I will make a decision. Taking into account everything that has been said tonight."

Mrs. Hummel stated she concurs with Mrs. Klinger to bring this out without a recommendation pending a legal opinion from the law department. She stated Mr. Rubino will be out of town next week. It is her intention to vote on this at a special council meeting on April I, 1996. She feels that it is important to have the nine remaining councilors present to vote on this ordinance.

The Committee was in favor of this recommendation.

The meeting was adjourned at 8:45 p.m.

[The Following Minutes Appear as an Attachment to the Plaintiffs' Supplemental Brief in the District Court Record at Document No. 173]

CUYAHOGA FALLS CITY COUNCIL
PLANNING AND ZONING
COMMITTEE MEETING

March 4, 1996

MINUTES

On March 4, 1996 a meeting of the Cuyahoga Falls City Council, Planning and Zoning Committee was held in City Council Chambers, the Municipal Building, 2310 Second Street, Cuyahoga Falls, Ohio at 6:58 p.m.

MEMBERS Mrs. Hummel, Chairman
Mr. Schmidt
Mrs. Klinger

Mrs. Hummel called the meeting to order at 6:58 p.m.

The minutes of the February 20, 1996 meeting were approved.

LEGISLATION CONSIDERED

Temporary Ordinance A-3 - Amend zoning regulations - R-1 Agricultural and Rural Residential and Single Family.

Temporary Ordinance A-39 - Approve plan for development - 72 unit apartment complex in the 300 block of Pleasant Meadow Blvd.

DISCUSSION

A-3 - Mr. Sharpe stated that the ordinance raised the lot size to 1.5 acres in the R-I. Mr. Sharpe addressed the questions brought up at the public hearing last Monday evening. He then asked if there were any further questions.

Mr. Ports stated this ordinance will help maintain a rural character at least in the area North of Steels Corners Road. Secondly, he feels the ordinance will help with getting septic approval.

Mrs. Hummel noted that one of the biggest differences she noticed was the large increase in the minimum house size.

Mrs. Loudin wants to know if this is all of R-1 or just North of Steels Corners Road.

Mrs. Hummel stated it referred to all R-1 lots.

Mrs. Harrington asked what happened if you sold your one acre lot. Would it still be a legal lot?

Mrs. Hummel stated yes it would remain a legal lot.

The Committee recommended A-3 be brought out for approval.

A-39 - Mr. Sharpe stated that he was there to present the site plan in relation to the zoning code requirements. He first described the location of the project and the zoning history of the site. This plan meets or exceeds all the requirements of the zoning code. The plan was recommended for approval by the Planning Commission with nine stipulations.

Mr. Steve Boone representing the developer stated that he met many of you at the meeting last week. Since that time Mayor Robart, Chief Smith and Mr. Sharpe had visited their oldest development in Troy, Ohio. They went through the project and he felt they all came away happy. He stated this is not a Section 8 housing.

Mrs. Hummel stated that Mr. Leipply and Mr. Potts would probably not be voting on this ordinance. Mr. Leipply has a residence in the area and Mr. Potts has a reservation on a lot. Under Council's conflict of interest ethics legislation, they raised the issue last week. Council did vote that they both have the potential for a conflict of interest. Mr. Ports may make some comments as a resident.

Mr. Bill Suren, 388 Village Court, asked who would be representing the residents with a vote.

Mrs. Hummel stated the other two councilman-at-large would be, herself and Mr. Rubino.

Mr. Suren felt by the two councilman not voting it would jeopardize their position.

Mrs. Hummel stated she felt it did not. In order for the legislation to pass it must be approved by six members of council.

Mr. Suren asked about the emergency clause.

Mr. Kennedy stated most of the City's legislation has the emergency clause. This enables the legislation to take effect when the Mayor signs it if it receives a

2/3 affirmative vote from Council. It does not inhibit the public's right to initiate a referendum.

Martha Shoults, 3489 East Prescott Circle, wants to know if there will be a manager on site for this development all of the time, 24 hours a day.

Mr. Boone stated certainly that is our preference.

Mrs. Shoults stated that does not answer my question.

Mrs. Hummel asked Mr. Boone if he wanted to change that to a yes.

Mr. Boone stated yes.

Mr. Larry Hart, 3479 East Prescott, does not feel that a five foot fence is a sufficient buffer between a retirement community and a 72 unit apartment complex with over 100 children. He feels they are not compatible life styles.

Mr. Sharpe explained the grading and the buffer.

Mrs. Debbie Rich, 24th Street, stated if this is not a Section 8 housing then what is it? How much is the rent?

Mr. Boone stated the rent for a three bedroom apartment, a net rent that does not include utilities is $457.00. A two bedroom is $370.00 plus utilities.

Mr. Jim Menough, 379 Pleasant Meadow Blvd, wants to know what kind of buffer will be provided for them. They are owners not renters.

Mrs. Hummel stated the site plan provided for a buffer on one side only.

Mr. Larry Dean, 3520 Wyoga Lake Road, wants to know what affect all these apartments will have on the wells in the area.

Mr. Sharpe stated no affect.

Mrs. Patricia Ryan, 318 Firwood, asked where did you come up with the income guidelines.

Mr. Boone stated the guidelines were set by the Internal Revenue Service who is providing the tax credit.

Mary Jane Pappano, 355 Village Court asked about the minimum and maximum. What happens to people that lose their job and what is the impact on the Woodridge School District?

Mr. Boone stated the minimum and maximums are part of the lease, if they violate the lease they will have to leave.

Mrs. Hummel stated that Dr. Clapp was at the Planning Commission meeting and had stated that this density was not factored into their enrollment projections.

Dr. Ranjit Gupta, who owns 311-329 the apartment building directly across the street on Pleasant Meadow Blvd, feels with these rents his building will lose tenants. He feels it would completely devastate his investment.

Mr. Dean Taylor, 69 Paddison Ave., feels these people do not pay taxes and says what is keeping his children from going to this unsupervised playground.

Mrs. Hummel stated that the playground will be part of a private development and that if his children were there he as a parent should be supervising them.

Mr. Don Bridenthal, 3537 Wyoga Lake Road, is concerned about the increased traffic on an already crowded street.

Mr. Sharpe stated the impact on Wyoga Lake Road should not be significant.

Mr. Bridenthal stated he did feel it would be a traffic problem.

Mr. Sharpe stated there will be additional cars.

Mrs. Hummel asked Mr. Sharpe to explain the tax evaluation that he handed to her.

Mr. Sharpe stated that the development would pay $62,543 a year in property taxes, $33,680 of which would go to the Woodridge Schools.

Ms. Becky Del Propost, 373 Pleasant Meadow Bird, has lived there for five years. She feels safe where she is and worries about her property value. She asks Council not to vote for this development.

Mr. Ron Baranchik, 383 Pleasant Meadow Blvd., wants to know how will a school bus turn around on this road. He states a snow plow cannot turn around.

Mr. Lee Minier, 3404 Prescott Circle Stated he has lived there four years. Most people there have paid $100 - $150 thousand for their houses. With all the upscale housing in the area, why are we even considering this type of development.

Mrs. Hummel answered because it is zoned R-17 and there was an application made to the Planning Department.

Mr. Minier is also concerned about this development spilling down the road and including the Gun Club property, which is also zoned R-17. He feels somebody may have dropped the ball somewhere along the line that was a mistake. Do not compound it by making a second mistake approving this.

Mrs. Lisa Rocko, 106 Timothy Ave., is concerned about the educational quality in the Woodridge School District. She worries about class size with this influx of children.

Mr. Sharpe stated that this project is being built to a standard of units that rent for $1,000 - there is no difference in construction. Through a series of laws at the federal and state levels the federal income tax code was amended. These tax credits are designed to provide housing for people that are working and cannot afford to live in the area.

Scott Del Propost, 373 Pleasant Meadow Blvd., wants to know how the city justifies putting 300 people on six acres of land.

Mrs. Hummel stated R-17 allows for a density of 17 units per acre. This project is being developed at a density of 11.4 units per acre.

Mrs. Pribonic, 3485 East Prescott Circle, states that they plan on retiring there. Mr. Sharpe states that their property values will not go down. She says they already have.

Mr. Schmidt feels the people affected by this are compassionate people. He feels the concern is that they have a quiet retirement community and what you are going to do is put something next to it that is completely different than what is there now. This is what their concern is and he feels it is a valid concern.

Mrs. Matuska, 3530 Prescott Circle States that there are too many school buses with Walsh, CVCA and Woodridge buses now, along with the developments.

Mr. Don Whitely, 3477 East Prescott, asks in as much as we have not discovered if school buses can get in and out of there, will this be sent back to the Planning Commission prior to approval.

Mrs. Hummel stated that it is her understanding that it would not be.

Mr. Sharpe stated that there was a 23' wide corridor through the parking area.

Mrs. Gupta stated that their apartment building pays $20,000 in taxes. She wants to know how much taxes is the development going to pay.

Mrs. Hummel stated Mr. Sharpe said the taxes would be $82,500.

Mrs. Gupta said that is for 72 apartments.

Mr. Frank Pribonic, 3485 Prescott Circle, stated that it was said that property values would not decrease because of this project. VVhitlatch Homes has decreased the price of their new homes by $10,000 in the past two weeks.

Mr. Bill Fenchel Jr., 3306 Kellybrook Ave., asked Mrs. Hummel since she was the council person-at-large, with all these constituents here that are voters, how are you going to vote on this.

Mrs. Hummel stated she will make her vote on this next Monday night.

Mrs. Lesley Conti, 2584 North Haven Blvd., says it is her understanding that the average income to move into these apartments is about $20,000. What is the most they can make and live there.

Mr. Boone stated it depends on the number of people in the family. The highest income for a family of four is $36,000. He also stated the maximum number of people he thought was 2 per bedroom.

Beverly Smith, 3398 Hunter Parkwey, said we are not just concerned about this, we are opposed to this. She does not want this in her back yard. We went the councilman to vote against this.

Karen Hayes-Brouse, 3364 Hunter Parkway, stated she is one of the ones who passed the petitions. She

says they have 432 signatures as of this morning and they have a large area they have not hit yet..

Mrs. Miriam Krausman, 3422 Wyoga Lake Road, says she voted for the merger but if she had known this, she would not have. She did not know what R-17 meant. Next time put it in plain English.

Dr. Richard Clapp, superintendent of Woodridge Schools, has checked with their consultants that did their enrollment projections. They were expecting no more than 42 students from that area. Obviously, we have heard here tonight that we could get 130 plus students. Not only are we concerned about this project but also the other R-17 acreage down there that is not spoken for. If all that were to go this direction the projects we have done would not be sufficient to house the students we would get from that area. This would place a burden on all of the taxpayers in Ward 8 which is not in our plan for the long range.

Mrs. Hummel said there was one other question raised about the school buses.

Dr. Clapp said that was shared with him and he did not have the answer. He would need to check with his transportation supervisor.

Mrs. Hummel said the lanes are 23' with the cars parked. However you have an in and out.

Dr. Clapp said it appears to him the way it is drawn that the turning radius may not be sufficient.

Mr. John Daily, Pleasant Meadow, says he owns the property adjoining the development. It was zoned R-17

approximately twenty years ago because it was a buffer between the residential and the industrial area. It has been that way for a long time. In the last twenty years it has been built on a piece at a time. He thinks that most of the concerns here are not that it is high density but the fact that maybe we should stop building in the area altogether. Most of the arguments are saying we will have too many kids in the school. Well if you build houses your going to have more kids. It does not matter what kind of houses you build, your going to have more kids. He thinks most of the argument seems to be that it is federally subsidized housing and that creates a problem in his opinion. He does not care if it is federally subsidized or not. He thinks a-lot of statutes tell him you cannot stop that kind of thing. If this were not subsidized most of the arguments go right out the window. He thinks we really have ourselves in a problem when we say we will have high density but high density on my terms. If we had building in Northampton on his terms all these people would not be living here. He would not let them build anything. So the fact is you have progress and you are going to put in high density. He is selling his property eventually because he wants lower density where he lives. That is a choice you make and a choice each person goes along with. When they make the commitment it is going to be a higher density situation, then it is going to be, and you have to make it viable for however many people they stuff into that area. His personal opinion is that the condominiums stuck too many people in them. That is the way the world goes around. If you take these arguments, then

you cannot develop anywhere in Northampton. Well if Woodridge has enough students, we will stop there. That would be fine but try to sell that. People have land they are going to sell and develop and it is going to happen. Unfortunately, we are going to have more and more people on this earth and they are going to build houses. Now the question is - is the argument the fact that we are growing or the fact that we have a subsidized housing project. His opinion is that the arguments here are all because we have a subsidized housing project going in. He is not happy with this either, to be honest with you, but they are a fact of life and unfortunately they are a statutory part of life. There are certain prejudices we are not allowed to have any more to be politically correct. He thinks you have to take into consideration, yes we are going to grow, yes we are going to have more students and more houses. We are going to have more people. Now the question is once you say that, when do you say stop to this guy and go ahead to this guy. It is O.K. for you guys to build and it is not O.K. for you guys to build. He does not think you can do that and that is the problem he sees with it. if he was building this project and it was not federally subsidized, would everybody be upset? He does not think so. So to him your looking at a question and really an ethical question. Does development stop as soon as somebody mentions the awful word of federal subsidy. He does not think you can do that. That is his point and he thinks you should let them go with it.

Ann Bridges, 3125 Rice Road, is concerned about the extra crime and drugs that come with low development housing.

Kay Whitehead, 3490 East Prescott, asked Dr. Clapp if this development is private property. Would not the pickup be on Wyoga Lake Road?

Dr. Clapp said either that or a turn around so that we did not have to go in.

Mr. DeSaovatore, 3510 Wyoga Lake Blvd, says his property abuts this whole abomination to the East. Why are we not given the same consideration as far as setback trees and fences as Prescott. We are not trash on Wyoga Lake Road.

Mr. Dale Zimmerman, 3382 Board Drive, said the issue that was just in front of the board was to make the R-1 more rural. He feels we need to re-evaluate the land use plan.

Mrs. Hummel agrees we need to review the zoning in Ward 8.

Mrs. Ann Houston, Prescott Circle, asks is it guaranteed by the ownership that the project will stay under the same low rent program.

Mr. Boone says the state administers the rules for 30 years by a restrictive covenant.

Mr. Houston asked how old is your oldest project and is that the one the Mayor went to see?

Mr. Boone said it was 2 ½ years old and it was the one they went to see.

Mr. Ron Baranchik, 383 Pleasant Meadow Blvd., asked did they ever look at the possibility of a senior citizen's complex. He feels it would be more compatible.

Mr. Boone says they cannot change the way they applied for the credits.

Mr. David Willett, the Dales, says he heard the average income was $30,000 in Cuyahoga Falls. If all these folks managed to live in Cuyahoga Faits without a subsidy, why do we need a housing development where they are going to be making $30,000 and getting a subsidy? Try to find a community that wants this. Nobody wants this thing.

Mr. Wayne Jones said he was there for the E-Check meeting. However, there is one thing he would like to correct that Mr. Sharpe said. This is not a state program. It is a state administered program. It was mandated by the federal government. We had no vote on it in Columbus.

Mr. Sharpe stated you created the Public Housing Finance Agency.

Mr. Jones said it was on the ballot. The voters in Ohio approved the public housing aspect of it. The state legislature did not approve the implementation of this. It was from the federal regulations.

Mr. Sharpe stated it was his understanding when the Ohio Housing Finance Agency was created the first thing they did was make loans available to Ohio Savings here in the Falls for anybody who wanted to

buy a house. And they wrote down the interest on it. The state legislature got involved after the Federal Housing Tax Credit Program evolved and they created a separate finance agency under the umbrella allowing a non profit to administer these. But this was created at the legislative level of the state of Ohio.

Mr. Jones stated he was not going to argue. With regard to the Woodridge School System, we have about 1,100 students right now. With the number he heard, 134 students would be a 12% increase in the school population. The taxes will provide about $225.00 per student. The Woodridge System spends about $5,800 per student. Where is that difference going to get made up. He is somewhat offended by someone preaching about low income housing. They make you feel like this is to help poor people. This is simply true and fact about making money. The fact is he is here to make money and he is doing it in the name of poor people. I am telling you right now when the merger between Northampton and Cuyahoga Falls took place there were supposed to be one acre lots. Now there is some other zoning that I know took place that was less than that and that is O.K. I will guarantee you if there were units that were on one acre lots you would not have this problem. The problem is condensing these individuals in one place like Prange Drive. It just breeds problems. I think it is a legitimate concern. You say you cannot do anything about it. I feel that is unfair to the people who came down here.

Mr. Don Hinson, Patterson Ave., asked Mr. Boone about the project in Troy, Ohio. He wants to know what the crime rate is.

Chief Smith talked to the Chief in Troy. He asked him about the crime rate. He said it was not any worse than any other development. Chief Smith said he had a print out of incidents reported to the Troy Police in 1995. There were 155 incidents reported mostly minor up to one felony which was a burglary.

Mr. Hinson commented they were here to ask Council to vote it down and that is it plain and simple.

Mr. Frank Averill, 3484 Prescott Circle, said we all know what the opinion of the people is here. Now when do we get this resolved?

Mrs. Hummel stated there will be a vote next week.

Joyce Harrington, Wyoga *Lake* Road, said she is against any development right now. She is concerned about the sewer which runs right through her yard and she has sink holes in her yard. Also she is concerned about the safety forces.

A gentlemen questioned what happens to the lower area where the gun club is located. Will there be roads tied into Prescott Green. Also there has been discussion about turning the area into a park. Is that being considered?

Mrs. Hummel stated there is talk about rezoning and the possibility of a park being considered.

Marion Grove, Prescott Circle, stated she has been a widow for thirty years and she pays $2,000 a year in taxes and if they raise them she will not be able to pay.

David Jones, 3518 Prescott Circle, says he has been offended by hearing he has no sympathy for hard working people in machine shops. And the other gentleman saying we were not politically correct and could not vote against it. He feels we can. We are the voters and we are the ones who pay the taxes in this community. We voted you people in so hopefully you people will do the right thing.

Mrs. Hummel stated she would like to thank everyone for being cooperative. You have kept your comments relatively short. We all appreciate your coming down here and letting us know how you feel. And you are exactly right, we are your representatives.

Mayor Robart thanked everyone for coming out. I look around the room and I see a lot of people that had single family homes in the Falls. They sold them and moved into the condominiums. They are the real heartbeat of the community. Most of the people that came out tonight 90 - 95% of them were here because of E-check and this low income tax credit. Two federal programs that were listed on the state, as Wayne said and subsequently on the local governments. I point that out, because in George's memo, that came out to you. It sort of implied as though we at the local government have some control to turn this thing around. I really question whether we do or not. I know no one likes to hear Mr. Daily's comment, but when I get done, maybe you will see what I am talking about.

All these federal programs clean air, clean water, aid to the disabled, all the housing programs that came down from on high. They are all great. We read about them in the paper. They are big headlines. Clean air passed and we all say that is wonderful. But what we do not realize is what is the impact on us on the state and the local level. I want to tell you ladies and gentlemen, the impact is tremendous. Whether it is dollars and cents or whether it is a change to the social landscape, it is a significant change, to every one of us and sometimes we all do not realize it but believe me I have been working with Council and the budget for the last ten years. Every time one of these comes in, it is a heavy hit on this city. Mr. Snyder, when he talked about the E-check, used the word duped and we all kind of laughed. I would use the word extortion, because when the federal government brings something down from on high, we really do not have anything to say about it. It is done. The reason I say that is here in Cuyahoga Falls, we get about $2,750,000 from the federal government. We get that in the form of bridge repair, highway repair, resurfacing, different grants, CBG, police grant awards and the HEAP fund. All these things are federal funds that we get and if we do not comply with what the federal government sends down, that money is taken away. Now we can all sit here and say it is not worth it. Give the money back and believe me we have all thought of it. But that is a lot of money and when we run into these obstacles, usually it is what do you do now. I do not know of a city that has turned the money down and not imposed these changes. The reason that I say that we as local

officials probably do not have as much control as everybody in this room thinks we do is because the reality is we can all be sued. We can be sued as a city. We can be sued individually in our individual capacities. We can be sued as administration and city council and in the end, if we are, the reality is we are probably going to lose. Now I know nobody in this room wants to hear that but that is the reality. We are probably going to lose. Because the program was set up by the feds, it was sent down to the state and it was dropped on us and we can either work through it or forget it. Now where does that leave us? I got a letter from Brenda Wetlon. I do not know if she is here tonight, saying she would oppose anyone voting for this. The reality is that the frustration is probably misdirected. There is not anybody on this Council that voted for that and there is not anyone is this administration that did. We are stuck with it and we are going to try to work through it the best we can. I noticed in the paper today and some of you might have read it. There was an article called "Stuck in the Getto". It talked about subsidized housing, section 8 housing and it talked about problems associated with it. If you read it, it said, the proponents of subsidized housing want to put the low income people out into the suburbs. We do not have enough of them in the suburbs. They have too many of them in Akron. Part of the theme was, we in Cuyahoga Falls, Tallmadge and Stow and some of the other suburbs ought to have more subsidized housing. Well the reality folks is, we have done our part. We have done are part off of

Graham Road. We are all aware of that. We have done our part in scattered housing.

In the ten years I have been Mayor, whether I like to admit it at this point or not we have not turned down one project in the City of Cuyahoga Falls. So anybody that wants to paint us as bigots or anything else, is flat out wrong. We have played our part and we have played it to the fullest. If you ask Tony O'Leary, who was quoted in the paper today, he will tell you the answer is not moving them out into the suburbs. He is saying lets just upgrade what we have. That brings me to my final point. If there is this money available, this pot of gold somewhere that the federal government is putting out there, why don't we take that money and ship it down into the existing sections that is already there, that they claim is not good enough to live in and lets upgrade it. Lord knows that the social engineers back twenty or twenty-five years ago brought us busing. That was a wonderful project up in Cleveland, wasn't it? We all now know that Cleveland has the worst school district probably in the country. We went down that road, didn't we? Let me close by saying this. I think we are going down the track to fast. This thing was just brought to Council. It went through the Planning Commission. Everything is going to fast. I think there are legitimate concerns. First of all, we have Dick Clapp here tonight. He is raising concerns about the schools. Wayne Jones said the same thing. I think he is right. I think we need to look at that. The other thing is we talked about a feasibility study. Has anybody seen a feasibility study? Have we looked at it? Have we dissected it? Do we know what is in it? With

the addition of this project, it has been suggested it would depreciate values in the Falls. Is that true or isn't it. We can find those things out. We can look at other cities where similar situations have happened. What happened to the surrounding housing stock. Did it depreciate or didn't it? It is not something that is speculative. It is fact. Let us look at that. And what is the impact on Cuyahoga Falls for police and fire? What is the impact? Do we know?. One of the things we observed and I will throw this out, the Chief tried to explain this situation and it's a very confusing situation in terms of subsidized housing. We have all read the police blotter. We all know the number of calls that come out of Prange Drive and some of the other places. What that translates to is the bad news that we do have a disproportionate amount of calls in there for disorderliness and domestics and things of that nature. The good news is, almost without fail, it is self contained and it does not spill out into the neighborhood. If you do not believe me ask the people in Camden Knolls. They will tell you the same thing. That is the good news, but what does that mean in terms of a barrier. I have heard suggestions of five foot fences not being big enough. The other side of the coin is if you put a fence higher than that it creates ill feelings in a community. So is the five foot right? I don't know but I believe we need to look at that. In the end, I am suggesting, Kathy, that I realize everybody is on the spot on this ordinance and it is hot in here. I suggest that we table it and that we begin meeting in smaller groups where everyone can truly vent their feelings, so that, we can get to the hub of the issues.

We can discuss them one on one, two on one, whatever it takes to get every possible issue out on the table and reconciled. Then at that point, whether it be two weeks, a month, I don't know how long it will take. The thing is, I don't know how many meetings it will take. At that point, if we still have what is probably the largest, turnout ever since I have been around the City, I say we turn it down. I say we go to court, maybe we win, maybe we lose, but at least we will have done everything we possibly can to make sure we are doing the right thing at this time.

Mr. Schmidt said he would like to respond to some of what the Mayor said. You know it is very politically popular now a days to demonize every issue in America. We see it on the national level and we see it on the local level. Basically you missed the point Mayor. This is not an issue about subsidized housing, about American's with disabilities act, about busing or about anything else. The issue is about how did that vacant tract of land get zoned R-17 and remain zoned R-17 next to what is basically a retirement community. Who dropped the ball here at Cuyahoga Falls City Hall. I take umbrage at you sir for talking about subsidized housing. I tell you, I came from a working poor family. My father died when I was eleven years old and my mother raised four kids and worked full time. So, I have compassion for working families. Our family rose above so I have a lot of compassion. That is not what this is about. This is about density next to a retirement community basically and its about compatibility. And somebody here at City Hall dropped the ball on that and this is a wake up call for

the planning department and the administration of the City of Cuyahoga Falls to look at other vacant tracts of land and make sure this situation does not happen again.

Ms. White stated I would like to follow up on Mr. Schmidt's comments. He echoes my sentiments completely. What I would like to ask the Planning Department for now that we are at this place, is some kind of a report that tells us how many acres of developable land are left in the city, divided by residential, industrial and commercial. A large map that we can look at because you know we had 138 development projects go through Council in the last four years. Once we dispense of it, it is hard for me to visualize when the next one comes in what we are talking about, what is left, what the zoning is in the adjoining areas and so forth. Is it possible for us to get that from you so that we can have it with us, when we discuss planning issues? Especially in regard to Ward 8, because I think that we need to step back and take a breather and see where we are. Maybe, revisit the land use plan. Let's just talk about it in earnest now, O.K.? Thanks.

Mr. Potts stated that he can lay claim to being involved in this longer than anyone. He has been involved for nineteen years in the old township. It was a conditional zoning which meant the appeals board could set conditions on what kind of development went in here and how it was put together. Something that we cannot do with the R-17. I think we pretty will have to do it by the book. In the merger we took the R-

3 zoning and simply combined it with the R-17 in the City. In 1986 we took a look at this area and the area was added to the R-17. He feels that Council needs to take a look at rezoning the adjacent parcels and maybe even the parcel we are looking at tonight. He feels the area needs to be compatible with the existing developments.

Mr. Rubino stated he was out to Prescott Common to the guardrail at the end of Hunter Parkway. He was awestruck at the natural beauty of what he saw down in the Mud Brook Valley. As he was perched, looking down into the valley, he noticed that Mud Brook snakes its way through a wooded area through Mr. Daily's property and through the Gun Club property. The topography around there with its bordering wooded hills, the escarpment behind the Gun Club area and the creek itself revealed something quite apart from the site plan we are contemplating tonight. He started wondering why we were talking about developing these three R-17 sites at all. What he saw was one of the most beautiful areas in the City of Cuyahoga Falls that close to the central city, both Ward 5 and Ward 8. We do not have a lot of green space left in the old city and this is like two miles from where your sitting tonight. He immediately thought that this area should be reserved for the people of Cuyahoga Falls and become a quiet contemplative type of park, perhaps an arboretum. Something for everyone to share. The idea of putting apartment buildings all through that valley started to become repugnant to me. He watched a red tailed hawk and five deer walk across the escarpment. He knows we

need a city wide land use plan, one that is balanced between development and preserving green areas. "I know that the City has a lot to offer, as far as land that is available, and developers are ready to gobble it up. Let's face it folks the beast is hungry. I don't have a problem with business or capitalism. I fancy myself in the same mold. Nor does he have a problem with us expanding our tax base in certain areas of Ward 8 to help all of us from paying 4% income tax someday. I do believe however that we need to look at the Mud Brook Valley and decide as a people if developing these sites enhances our overall quality of life and preserves the best of what the Falls has to offer in natural beauty. I believe we owe it to ourselves and our posterity quite frankly, to reflect upon this entire area and potential development there as to whether this development is in the best interest of Cuyahoga Falls residents. Once bulldozers start, it is too late. I do not know whether we can afford to have a park there. I do know this, I think we should seriously start looking to that and putting it in the public trust and possibly talking to Mr. Daily, the Gun Club and Mr. Boone and seeing if the City can purchase those properties. Once again, I do not know if we can afford it and I am not sure that we can afford not to. So, I am kind of asking this Council and the Administration to study what I have proposed in an expeditious manner. The site plan, that we are studying tonight is separate and apart from what I am bringing to the forefront tonight, but I would like us to seriously consider preserving a lot of this area. I have heard that the City has been acquiring reservations running along Mud Brook and

I am thinking that someone had already anticipated making that into some sort of benefit to the people of Cuyahoga Falls, in the terms of some kind of walkway or whatever. I would like to ask Lou Sharpe at this time if I am right in my assumption? Also would a park in that area fit into our current land use plan?"

Mr. Sharpe stated we have been actively involved in that. In fact we have acquired all of the land in the Mud Brook flood plain. It is currently owned by the City or covered by scenic easement with the exception of Mr. Daily's property, the Gun Club property and this property. I have seen that area evolving similar to what happened on the west side of Cuyahoga Falls at Bah Run. I would strongly support your efforts to acquire the Gun Club property and Mr. Daily's property because that would provide us with a staging area and maybe a picnic area, for a hiking trail along the creek. We have had discussions with Mr. Hunter about acquiring the Old Mill pond or the land around it. With the long range goal of someday when the Parks Department finishes with Kaiser, we would be able to say we have this little gem that we have been saving for you. It is certainly something that we have begun working on and we have got it for nothing up to this point.

Mr. Rubino stated he is a bit of a history buff. Pontiac, who was an Ottawa Chief, had a village on the Herbruck farm on Portage Trail. He was visualizing as he was looking down on the creek the other day, Pontiac and his tribesman walking along the creek. I

think now about what we are about to have there and he feels he would rather have the Indians.

Mr. Bedell asked if a builder has been selected.

Mr. Boone said no.

Mr. Velo asked how close is this development to Prescott.

Mr. Sharpe stated 80 feet.

Mr. Velo stated the dialogue has been wonderful. He stated with all the questions we have, it would be foolish to go on with this or approve it. He does not appreciate being threatened about not being voted for. He would rather listen to your complaints than the threats. He thinks that issue needs to be held or turned down. He thinks he would like to see our whole zoning restudied as we said and he thinks Mr. Sharpe had his hands tied. Maybe he is doing what he feels we have to do. If he is doing that then he is doing his job. If it came from the state or the federal, lets not point fingers lets just try to resolve it.

Mr. Usberghi appreciates everyone being here and making the comments they made. I think it tells us as a Council how you feel. I think everyone on this Council should think about this and they should vote the right way. There are a lot of other issues that could be explored with this land. I agree with Mr. Rubino and I agree with Mr. Velo that we should look at rezoning. Obviously, we cannot look at this piece of property right now. The adjacent properties we can and I suggest we do it as soon as possible..

Mrs. Hummel stated, based on the comments she heard around the rail, her preference was to hold this. We have had two particular issues raised. The school buses and the park issue. I think that is something legitimate that we all need to think about. The Mayor has raised some other issues that he would like to see addressed. So. my inclination is to hold it if that is acceptable to the Committee.

Mr. Schmidt said be was in favor of bringing it out, voting on it and being done with it.

Mrs. Klinger feels it is prudent to do further study.

Mrs. Hummel agrees with Mrs. Klinger. What the plan will be folks, just so you know, I told Mr. Fenchel I would be voting next Monday night. I will not be voting next Monday night. The normal course would be for this to be heard again in Committee. We will do some research on some of the issues that have been raised tonight and we will hear this again in Committee two weeks from tonight, March 18. I assure you, you are all welcome to come back again. I assure you, you do not need to come back again. I think we have got your message. I suggest that you send representatives so that you are all informed, but you are all welcome to come back. The normal course would be for us to vote on this if it is reported out of Committee on March 25th. However, Mr. Rubino is going to be out of town and he has expressed to me that he would like to vote on this. So, I do not know that it will be brought out on the 18th - based on Mr. Rubino's request that he be here to vote. No action will take place on this until March 18th.

The meeting was adjourned at 9:28 p.m.

[The Following Appears as an Exhibit In The District Court Record at Document No. 174]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 5:96 CV 1458

[FILED AUGUST 21, 1998]

BUCKEYE COMMUNITY HOPE FOUNDATION et al Plaintiffs	)
-VS-	)
CITY OF CUYAHOGA FALLS et al. Defendants	)

JUDGE BELL

STATE OF OHIO)
)SS:
COUNTY OF FRANKLIN)

I, P. Gilbertson Bamo, being first duly sworn upon oath, depose and say:

1. I am the Executive Director of Buckeye Community Hope Foundation, one of the named plaintiffs in the above-captioned case, and am familiar with the details of our proposed

72-unit apartment development on Pleasant Meadows Boulevard in Cuyahoga Falls, Ohio.

2. At the current time, there is no certainty that we will be able to proceed with this development.

3. Since we initially filed for a building permit, because of the time delays we have suffered as a result of the acts of the defendants, we have had to return to the Ohio Housing Finance Agency the low income housing tax credits which were to form the major basis of our funding for this project.

4. These tax credits would have had to be used by the end of 1997, and were thus worthless to us because the project had not been completed by that time.

5. While it is possible that we may be able to secure new tax credits to replace those which were returned, there is no guarantee that we will be successful in this attempt. The Ohio Housing Finance Agency has discretion to issue noncompetitive tax credits to projects which had been competitively awarded tax credits in prior years, but which were unable to proceed due to governmental action which has been judicially determined to have been improper.

6. We intend to apply for tax credits under this provision of the State's Tax Credit Allocation Plan, but there is absolutely no guarantee that we will be able to secure new tax credits to replace those which were lost.

7. Without the issuance of new tax credits, we will be unable to build our development unless the lost funding is reimbursed by damages assessed against the City of Cuyahoga Falls.

8. Because of the delays we have suffered from the acts of the defendants, we have lost our construction loan commitment. Prior to securing a new construction loan commitment, our construction costs must be re-estimated, and we must determine if the project has been rendered not feasible because of the increase in construction costs which arose during the period that construction has been delayed.

9. As part of this process, we must determine if our sources of funding are sufficient to meet the increased uses of that funding. We must also determine how much bigger our permanent loan will have to be to meet the burden of the higher construction costs, and if the rent structure to which we have committed for this project will support the resulting increase in our debt service.

10. In short, prior to securing a construction loan commitment, the entire project will have to be underwritten anew.

11. The contractor for this project is currently re-assessing what the construction costs will be. It is not until matters have developed to the point where we have found out if we have been awarded non-competitive tax credits and are thus actually able to begin the formal

underwriting process that we will be able to determine with certainty the feasibility of our project and if we will be able to secure a new construction loan.

12. When we initially filed our State action against the City of Cuyahoga Falls, we chose to file a declaratory judgment action for two reasons: we hoped to secure a judicial determination of our legal rights before suffering serious damage from the City's actions; and *we had no damages* at that point which might form the basis for a compensatory suit.

13. It was not until the delays in construction reached the point that construction costs began to rise, that interest rates began to rise, that we suffered unexpected carrying costs on our land, and that we were unable to compete for future years' tax credits, that we developed damages sufficient to sustain an action for monetary recompense. By that time, the trial court's decision in our State case had already been issued. Thus, we *could not* have brought an action for damages at the time of our State case.

FURTHER AFFIANT SAYETH NOUGHT

SWORN TO BEFORE ME and subscribed in my presence at Gahanna, Ohio, this 21st day of August, 1998.

/s/_____
Carolyn M. Sell
Notary Public, State of Ohio

[Selected Pages from the Transcript of the Preliminary Injunction Hearing Dated November 19-21, 1996, Appearing in the District Court Record at Documents 70, 71, and 72]

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[Testimony of Louis Sharpe]

[P. 144] ...permit.

Q. And did you contribute to anything in Plaintiff's Exhibit 177

A. Yes. I contributed -- I said, "see notes S1, S4 and S5." I evidently had red-lined or wrote on those sheets or comments related to the site plan. I indicated there was a $5,000 site restoration landscaping bond that would be required prior to the issuance of the permit. And there was a $500 site inspection fee to be paid to the Engineering Department. And I also indicated that the ordinance that would allow this project to be approved was not in effect until May 1st, 1996.

Q. And unless otherwise changed by legal action or referendum, you said?

A. Okay. I guess I did say that, yes.

Q. And do you know how you came up with the date May 1st, 1996?

A. I believe that probably was given to me by my secretary, who probably coordinated with

someone in the Law Department to get that date. I didn't do that, but I was told that's the date.

Q. And if the plaintiffs had met items 1 through 4, you would have then approved the project for building permits, is that correct?

[p. 145]

A. Only if I would have gone out and ascertained that Mr. Boone had also constructed the fence that was required prior to the building permit issuance and graded the property at the rear in accordance with those stipulations.

Mr. Boone had already applied for a building permit for the fencing and we had a conversation that indicated to me I thought he was proceeding immediately with that. And that wasn't mentioned in this response, but subsequent to that he did not proceed with the fence. And would he have applied for the permit, even having met those other three or four requirements, I would have made sure that the fence, the work had been done.

That was to make sure there was no trash or any associated offensive activity that would have been observable or blowing or taking place on the property to the south. We were trying to make sure that these neighbors started off on the right foot.

Q. Now, with regards to going back to Plaintiff's Exhibit 14, Mr. Sharp.

A. Yes.

Q. Plaintiff's Exhibit 14 is the reply by Buckeye's architect to Plaintiff's Exhibit 17, is that correct?

A. Yes.

Q. And did you receive a copy of this around May 16th of 1996?....

[p. 150]

THE COURT Okay. Do you want to talk about it?

MR. KRAMER: Yes, your Honor.

(Discussion between court and counsel at the bench, and off the record.)

BY MR. KRAMER:

Q. Mr. Sharpe, when you submitted the staff recommendation to approve the site plan, did it meet, in your mind, all the necessary requirements set forth that had to be considered for approval?

A. At that time, yes.

Q. And has your opinion changed on the site plan since then?

A. Yes. Because of the ruling by the judge that the charter and referendum was valid. So as of

today, I would not, and would not approve the application for the building permit.

Q. But the site plan itself has not changed since the time you found it to be, in your mind, meeting all legal requirements?

A. No. The site plan hasn't changed, nor has the rules. The rules have always been there too, they have just been interpreted.

MR. KRAMER: Can I have one moment, your Honor?

THE COURT: Sure.

[p. 154] ...the stipulations?

A. Yes.

MR. ARRINGTON: I have nothing further.

THE COURT: Mr. Morrison.

MR. MORRISON: Yes.

DIRECT EXAMINATION

BY MR. MORRISON:

Q. Mr. Sharpe, I just have one or two brief questions. I think you may have said this already but lest I miss it, I want to make sure as we sit here today, a fence has not been erected on the property, correct?

A. Correct.

Q. Is the erection of that fence a prerequisite to the plaintiffs obtaining their building permit for the construction of the physical building itself?

A. It's one of several, yes.

Q. One of several. But it is at least one, correct?

A. Yes.

Q. And as we stand here today, as the person in the City of Cuyahoga Falls that's responsible for building and zoning, can you tell his Honor whether or not as we sit here today the plaintiffs are eligible -- notwithstanding the referendum vote -- are eligible to obtain a building permit on this project?....

[p. 156]

THE COURT: Please. Now counsel, I believe you have another question.

MR. KRAMER: Yes, your Honor.

RECROSS EXAMINATION

BY MR. KRAMER:

Q. As the Planning Director for the last 20 years, do you know of any rational reason for rejecting the site plan that you could state today?

THE COURT: In his mind.

MR. KRAMER: In his mind?

A. Today I can say that it can be rejected because Judge Murphy ruled that a referendum of the

voters takes precedent over any other laws under the Charter of the City of Cuyahoga Falls, and thereby the building permit which is tied to the site plan can't be issued, and I reject the application on that basis for the building permit.

The site plan has been approved. I have no rational reason whatsoever to say that there is anything wrong with that site plan as professionally. I mean personally, or if I was involved as a neighborhood, I might have a hundred rational reasons.

You are asking me to make a judgment about other people's rationale. And the plan met the requirements of the City of Cuyahoga Falls in all [P. 157] respects, it exceeded those, and I would find no reason to deny it on a legal or professional basis.

MR. KRAMER: Thank you.

THE COURT: Thank you, sir. You may step down, sir.

THE WITNESS: Thank you.

THE COURT: And your next witness is?

MS. CITRINO: Plaintiffs call Sandra Montgomery.

THE COURT: Miss Montgomery.

MR. ARRINGTON: Your Honor, for the record, we would reject to the calling of this witness. She was not disclosed to us.
I don't know, was she on the list Friday or Monday?

I'm not sure she is on any of the lists that we got.

MS. CITRINO: Your Honor, I do believe that he's correct. And what happened is we are trying to find potential members of the Fair Housing Contact Service, one of the plaintiffs here, who are interested in renting the unit. We can place another witness on.

MR. ARRINGTON: Your Honor, so the court is aware, I just now noticed she is on the list that I received yesterday at 3:30, but I still object for the....

[P.202] follows:

DIRECT EXAMINATION

BY MR. KRAMER:

Q. Would you give your full name and spell your last name?

A. My name is Mark Salling, S-A-L-L-I-N-G.

Q. And are you employed?

A. Yes, I am.

Q. And where are you employed?

A. I'm employed at the College of Urban Affairs at Cleveland State University.

Q. And what is your position at your employer?

A. I'm the Director of the Northern Ohio Data and Information Service at the college. And I'm also adjunct faculty in the Department of Urban Studies.

Q. Dr. Salling, would you look at what's been marked as Exhibit 18-T. Can you identify that document?

A. Yes. This is an analysis that was performed at your request.

Q. And would you go to Appendix 2 of that Exhibit 187

A. Yes.

Q. And could you identify that part of the document, please?

A. That's my resume.

Q. Could you tell the court your general education background?

[P. 203]

A. I have a Ph.D. in geography from Kent State University.

I'm sorry, did you just say educational?

Q. Yes.

A. I have a Masters degree in geography at Cincinnati. I have a Bachelors degree in geography at Kent State University.

Q. And what types of academic and professional experience do you have?

A. In my capacity at College of Urban Affairs I am involved in the use and distribution of demographic data, particularly the US census data. I am also involved in a variety of research projects using demographic data and related information. And I also teach, on an occasional basis, in the Department of Urban Studies courses such as urban special systems and research methods and in Demography and the Sociology Department as well.

Q. How long have you been director of NODIS?

A. Since 1982.

Q. And do you have any professional affiliations or awards or service recognition?

A. Yes. I received a service award from an association, National Association of Professionals Working in Computers and Hethods in Urban Agencies called URISA. I've also [P. 204] received an NSF funded fellowship to do work in a field called geographic information systems.

I'm sorry, I'm associated with some associations such as URISA in a variety of ways, including being the editor of its proceedings, annual proceedings. I'm a member of the

URISA Journal Editorial Board. And I'm active locally in a number of state and local organizations dealing with census data, demographic issues, and geographic information systems.

Q. And have you received any recent grants or contracts?

A. I received a number of grants and contracts. The latest one is a project in which we are working with local boards of elections using census data to help them move precinct boundaries to be in more conformance with census geography and, among other things, about a number of research grants as well.

Q. And are those listed in Appendix 2?

A. They are for the most part. There are probably some missing.

Q. Have you published in any professional magazines or articles?

A. Yes, I am published in some scientific publications. One of the most recent is the Annals of the Association of Geographers, co-authored a paper with some other colleagues on the issue of whether or not there is a disparate [P. 205] distribution of toxic release sites in Cuyahoga County relative to certain populations.

Q. Was that based on race of populations?

A. We looked to see whether or not the release of the location of release of toxic emissions was correlated with the minorities and low income populations.

Q. And was that a peer review publication?

A. Yes, that's a peer review publication.

Q. Have you had any other peer review publications?

A. Yes. I also had, last year, a peer review publication in the URISA journal. And I've also had one or two others in the past.

Q. Have you presented any papers?

A. I presented papers fairly frequently, at least one or two a year, at various professional and academic associations.

Q. And are those also listed in Appendix 2?

A. They are listed.

Q. Can you tell me what is meant by "human geography"?

A. Geography is broken into two major branches, physical geography and human geography.

Physical geography studies things like geomorphology, climatology and other physical earth science subjects.

Human geography is more akin to a social [P.206] science, looking at social, political, economic distributions, and that sort of thing.

Q. And can you define what a demographer is?

A. A demographer is someone who focuses on human population, how -- its characteristics of the population, how it changes over time and what its impact has on society, the economy and other aspects.

Q. And in the area of human geography and demography is the use of statistics important?

A. It is very important in order to analyze the world. In our way we use data quite a bit and the use of inferential statistics is critical.

Q. And can you tell me a little more about what the Northern Ohio Data Information Service does and is?

A. The Northern Ohio Data and Information Service, otherwise known as NODIS, does demographic analyses for clients and for researchers and with researchers at the university.

One of our principal functions is to provide census and other public information to the public in general and to governmental agencies, organizations who need that kind of information.

Q. And in your job as Director of NODIS, are you often involved in doing statistical analysis?

A. Yes, both for clients and also for researchers and [P. 207] for ourselves to understand the

demographic trends and patterns that are going on in our region and in the state.

Q. And have you ever used statistical analysis in determining racial make ups of various communities in the State of Ohio?

A. We have looked at the distribution of racial make up in the State of Ohio, and we have mapped it.

For example, we have used races in what is called an independent variable in order to try to a account for or explain the distribution of other kinds of phenomenon.

Q. And is it fair to say that you consider yourself as a human geographer and a demographic person?

A. Yes.

MR. KRAMER: Your Honor, we would move that this court certify Dr. Salling as a expert in the area of human geography and demographics.

MR. MORRISON: We would object to that, your Honor.

MR. ARRINGTON: We join the objection.

THE COURT: Mr. Schultz, any objection to that?

MR. SCHULTZ: Mo objection.

THE COURT: Go ahead.

MR. KRAMER: Thank you, your Honor.

Q. Have you been retained by plaintiffs' counsel in this [P. 208] case?

A. Yes, I have.

Q. And when were you retained?

A. I believe the date was November 6th.

Q. And what were you retained to do for the plaintiffs initially?

A. Initially on November 6th, I was retained to analyze census data in order to determine whether or not there was a disproportionate or disparate impact of building or not building the proposed development on the black population and households with children.

I was subsequently asked to perform a second analysis looking at whether or not there was a difference between the percentage of blacks in Cuyahoga Falls versus Summit County.

Q. And when were you retained to do that?

A. That was --

Q. That second study?

A. That was on the following Saturday, I believe. I'm sorry, the 16th.

Q. And that's the 16th of November?

A. Of November, yes, sir.

Q. Now, with regards to the first analysis, would you look at Plaintiff's Exhibit 18?

A. Yes.

[P. 209]

Q. Can you tell me what that document is?

A. That document is the result of the analysis that we were asked to perform concerning the disproportionate impact on minorities or on blacks and on families with children.

Q. Now, specifically for the proposed apartment development by Buckeye Community Hope Foundation?

A. That's correct.

Q. Would you tell me how you went about -- what methodology you used to make a determination in this area?

A. We used the most reliable information available in the US census that was taken in 1990. We used data from a portion of that census data called the public use micro data sample in order to specifically identify target groups for analysis. There are analyses for two geographic areas, so we could see if there was any significant difference between them, looking at the different areas in our analysis.

The first portion of the analysis we focused on the northern two-thirds or so of the county, which includes all of Akron and

communities in the northern section of the county.

Q. Could you tell me, does that include Cuyahoga Falls?

A. Yes, it does. Cuyahoga Falls is in the middle of that area geographically.

[P. 210]

Q. And can you tell me why you chose that particular geographic area to study?

A. We felt that the potential of the market for the rental population was probably in that vicinity, to a large extent, to the extent that as -- well, that the source of data that we were using would allow.

We also did a comparable analysis, a similar analysis for the entire County of Summit to see if there was any significant difference in changing the geographic area being used in the analysis.

Q. And so the first step in your methodology was to look at certain geographical areas for your analysis, is that correct?

A. That's correct.

Q. And then what was the next step?

A. Within that geographic area we identified two different groups. The first group constituted what we call the general rental market, where we identified from the census data all those

persons who were renting in that area in 1990. Then, as a secondary group to compare with, we identified what we called the development target market, which consisted of the same population. That is to say, renters, but renters in multi-bedroom apartment units. So that we were trying to identify the segment of the rental market which included persons living in multi-bedroom [P. 211] apartments in order to compare them with the general market of renters.

Q. Now why did you choose that second category to compare?

A. The proposed development includes units with two or more bedrooms in them, so we thought that the market therefore should focus on the population that would live in that kind"of housing.

Q. Did you do any other calculations with regards to excluding any renters from the general renter market?

A. Yes. For the purposes of identifying the development target market we also included only those persons that fell within the income guidelines as provided in the program that the development is designed for. That is to say, we used the income limits based on household size in order to further limit the size or the composition of the development target market.

Q. Now, I want to go back to the general renter market. Would you look at page 2 of your Exhibit 18?

A. Yes.

Q. Did you have any cutoffs with regards to renters using the general renter market or the target market population?

A. Yes. We did limit the general renter market to those renters who were paying at least $200 in rent in order to [P. 212] eliminate the very low rent rental population, and also to exclude persons who might be paying a nominal amount of rent, such as persons living with parents or others and paying nominal rents.

Q. And with regards to the target market population, you talked about income levels that you restricted that to. How did you come about to determine certain maximum income levels to be used?

A. Well, we used the income per size of--household size guidelines provided in the program for which the development is designed. And then when we identified households that met that income maximum threshold. We also adjusted -- because we were using census data from 1990, we adjusted those figures using the Consumer Price Index, which is a common methodology in order to compare dollar values for two different periods of time.

Q. So you used the CPI to bring 1989 data up to 1995 data?

A. That's a fair statement, yes.

Q. Was there any other information that you used, before leaving your methodology?

A. Well, once we identified the difference between -- we segmented the population into what we call the general renter market and the development target market. Then we wanted to compare the racial composition and household type [P. 213] composition in terms of whether they h~d children present or not and compare them between those two market segments.

Q. And would you go to page 3 of Exhibit 18?

A. Yes, sir.

Q. What is that, those tables on page 3 and concluding on page 4?

A. Table 1 focuses, again, on data for what we call the central or northern Summit geographical area. We did a comparable analysis that's in table 2 for the entire Summit County area.

Table 1 looks at the differences in racial composition between general rental market and the development target market.

MR. KRAMER: Your Honor, can I approach the witness.

THE COURT: Sure.

BY MR. KRAMER:

Q. Dr. Salling, maybe you can explain to the court the results of your table 1 and table 2 and your conclusions.

A. Okay. The general market is identified on this portion of the table. And you can see the raw numbers, the number of persons by race; white, black, other, and then total in the general renter market. And then the proportional distribution of those racial groups.

So that 79 percent of the persons in the [P. 214]general rental market in the central northern Summit County area are white; 18 and a half percent, approximately, are black; and 2.3 percent or so are of another race.

We did the same thing for the development target market.

Q. And explain again what is the development target market?

A. The development target market is a subsection or subportion of the general renter market only including those persons living in multi-bedroom housing units and meeting the income guidelines of the development.

Q. So it's people who would technically be qualified to be able to rent from the plaintiffs' project that was built?

A. Technically, qualified in terms of income and more likely to live there because of the type of housing, in terms of the number of bedrooms available.

Q. That's right. Thank you.

And could you go on and?

A. Yes. This column includes the raw numbers of persons by race in the development target market. This column is the percentage distribution of those racial groups, so that 68 percent are white, [illegible]ercent or so are black, et cetera. [P. 215]

Q. And from the comparison of these two groups, did You form any conclusion?

A. Well, what we did was we did a statistical analysis of the differences between the racial compositions in the two different types of markets. We asked the question, for example, is there a difference between 29 percent, which represents the black proportion in the development target market, and the 18 and a half percent, which represents the black proportion of the general renter market. And the resulting statistical value is indicated in this column, it's called the Z score. And the higher the Z score the higher the likelihood and the reliability that in fact those two proportions, 29.6 and 18.49, are indeed different beyond a reasonable sort of doubt. That is, beyond what might happen as a random occurrence.

And the interpretation of the Z scores is such that a value, a Z score of about 2 indicates that the researcher can be about 95 percent certain that the difference is not a random one.

That in fact there is something more to it than just random chance.

A Z score of a value of 5 indicates that there is less than a chance in ten million that there is such a random difference in those two numbers. And the value that we had derived here of over 23 indicates that the chances are in the billions that there is only a random [P. 216] reason for the difference in those two values.

Q. And from that did you reach a conclusion on whether or not in your central northern Summit County table 1, was there a disproportionate impact upon black families?

A. Yes. The results indicate that there are more black households proportionately who would live in such housing than in the rental market with which we compared that market.

Q. And if we now go down to Summit County, table 2, can you take us through the same calculations that you used and tell us your conclusions?

A. Again, the layout of the tables is identical; the general renter market numbers, by race of the developer's distribution and the development's target market end raw numbers and percentage distribution.

And the question we asked, is there a statistical difference, significant difference between the 25 percent of the development target market which is black and the 16 percent

of the general renter market which is black? Is there a difference between 25 percent and 16 percent?

And again, the Z scores were calculated. The Z scores are extremely high as they were and very similar to what we found for the smaller area we considered. And again, finding the same conclusion, that there is an [P. 217] extremely low -- I can't emphasize that word enough -that there is a probability, that there is a random difference in those two proportions.

Q. And what conclusions did you make oh on both table 1 and 2?

A. I would conclude, when we look at the northern two-thirds of the county or the county as a whole, there is a very significant difference in the proportion of black population that would be in the development target market versus the general renter market. There is a much higher proportion of blacks in the target market rather than the general renter market.

Q. Going to table 3. Was there any information on table 3 that you discovered needs to be corrected?

A. Yes. In fact, when I transcribed the table from a spreadsheet to my word processor to produce this table I inadvertently typed the labels incorrectly here. This is -- instead of with children, it's without children. And this is instead of without children, with children. And I mixed those two up when I typed it in my

word processor. And I did the same thing down here too.

Q. For table 4, too?

A. Yes, for table 4 the labels are incorrect, they should be switched.

Q. Can you manually, on Plaintiff's Exhibit 18 before [P. 218] you, make those corrections that you just testified to?

A. Yes, I can do that.

It's been done.

Q. All right. With those corrections, do your conclusions change at all?

A. No, not at all.

Q. And would you go through again, just as you did for table 1 and 2, the information on these two charts?

A. Okay. Again, this table 3, we are looking at the central northern Summit County area. We have identified the number of, in the general renter market, households that have no children in this case. And below that would be the number of such households with children in them. And the proportion in each of those two categories.

Q. For the purposes of the record, I think, would you go and actually give this information?

A. Sure. There are about 29,000 households in the general renter market in that geographic area

without children, about 13 and a half thousand with children.

THE COURT: By children you mean one or more?

THE WITNESS: One or more, yes. Yes, your Honor.

BY MR. KRAMER:

Q. And can we do the same thing now with the development target market?

[P. 219]

A. Yes, there are about 5,000 households in the more restricted development target market without children and about 66 hundred with children.

Q. And based on that information, did you draw any conclusions?

A. Yes. Again using the inferential statistics, the Z score, in order to ascertain whether or not there is a probability the differences might be due to some random chance, we find extremely high Z scores; in the order of 49 or 50, indicating that there is a very significant difference between the percent with children in the development target market versus the general renter market. Indicating that the development target market has much significantly higher portion of households that would be served by housing with multi-bedroom housing units.

Q. And could you go to table 4?

A. Table 4 is interpreted in exactly the same way. This is mislabeled actually. I'm not sure if that was in my report or not. This is Summit County instead of central and northern Summit County. You probably just blew up mine, so that's probably a typo in mine as well.

But again, the labels have been inverted here so that there are some 33,000 or 34,000 in the county households without children in the general renter market, that's about 67 percent of all such households, of all [P. 220] households; and there are some 16,600 households with children in that Summit County general renter market representing about 33 percent of the total.

Then we, in narrowing down the market to the development target market suitable for this kind of development, we find that there are 57 hundred or so households without children in Summit County; there are some almost 8,000 with children in the county. And the representative proportions are also identified there: 42 percent of the households have no children; some 58 percent do have children.

And again, the statistical analysis performed indicates extremely high Z scores, indicating that there is a very extremely low probability that the differences in such proportions might be due to some random chance.

Q. Would you turn to Appendix 1 of Exhibit 18. And can you identify what that part of the exhibit is?

A. Appendix 1 is simply my written results of the analysis that I just described.

Q. And turning to page 2. Can you tell me what is meant by these hypothesis null H-I and null H-27

A. Yes. In conducting empirical analyses using inferential statistics, the approach of a researcher is generally to specify the problem and then to operationalize the problem with the kind of data that you can use to [P. 221] address that problem, and to identify the specific question for which this data and your analysis will address.

One generally thinks in terms of what we would call the alternative hypothesis. One thinks of the hypothesis you think is true, and in order to test that statistically, you think of the opposite being true. And that constitutes, if that's true, that that's your null hypothesis. And statistically speaking, that's what you can really address using inferential statistics.

So one test, the proposition being proposed in the null hypothesis, if you can reject the null hypothesis, it supports your original or alternative hypothesis. If you cannot reject your null hypothesis, it pretty much discredits your original hypothesis.

Q. And what were the two null hypotheses that you presented for this analysis?

A. The two null hypotheses are as follows:

Black income eligible households are not a greater proportion of the multi-bedroom rental housing unit market than are black households in the general rental housing market.

Q. And can you tell me whether or not, based on the calculations that you did and your methodology, whether you could reject that hypothesis based on that data?

A. I would reject it.

[P. 222]

Q. And what's the second null hypothesis for this part of your analysis here?

A. The second null hypothesis is as follows:

Income eligible households with children are not a greater proportion of the multi-bedroom rental housing market than are households in the general rental housing market.

Q. And were you, based on the data analysis that you did, able to come to a conclusion with regards to that second null hypothesis?

A. I would reject that one as well.

Q. Would you turn to page 6 of Appendix I.

And would you tell me your specific conclusions that you came to under your study?

A. Based on the information that we had and used, the census data, and looking at the specific questions that we did, we concluded that race and family composition, as defined as households with or without with children, are significantly different in the development target market from the general renter market, no matter whether we are looking at the northern portion of the county or the entire county.

Q. And therefore, if the 72 units of the plaintiff's apartment complex would not be built, what conclusions would you form?

[P. 223]

A. There--

Q. If any?

A. I would conclude there would be a disproportionate impact on the black population and households with children.

Q. And can you tell me whether or not that is to a reasonable degree of scientific certainty?

A. It's with a high degree of scientific certainty and the data that we used.

Q. Would you go to what we have marked as Plaintiff's Exhibit 35. And could you identify that document?

A. Yes. That's a similar analysis using similar methodology, only in this case, simply comparing the proportion of the population which is black in Cuyahoga Falls with the proportion of the population which is black in Summit County.

Q. And can you tell me what data you used?

A. We used the 1990 Census of Population and Housing. Again we used -- I'm sorry, in this case we used the Summary Tape File Data.

Q. And if you turn to page 1 of Plaintiff's Exhibit 35. What was the methodology that you used?

A. We simply identified from the census data the number of persons in Summit County and in Cuyahoga Falls City separately that are white, black and other, and calculated [P. 224] the percentages of the population in each of those racial categories. And then compared the percentage black and the other racial categories as well between the county and Cuyahoga Falls City. And again, used the Z score as a test of the difference between proportions. Meaning that we were asking the question: Is the 11.8 percent black population represented in Summit County statistically different than the 1.06 percent that is black in Cuyahoga Falls City?

And the results, again indicated by the Z score, were extremely high Z score values, which indicate that there is a very large difference in those proportions and very

statistically strong difference in those distributions, those percentages.

THE COURT: You have proven that there are more in one location than another. What does that prove?

THE WITNESS: It simply documents the obvious in this case.

THE COURT: Which is the obvious.

THE WITNESS: Yes.

BY MR. KRAMER:

Q. And your conclusion in regards to that data, what are they?

A. Very simply, that there is a significant difference in the proportion of blacks in the city versus the county. [P. 225] That there is a very much lower proportion of blacks in Cuyahoga Falls City. And that difference is due to more than simply random differences in the data.

THE COURT: Do you suggest that that configuration somehow was allied arithmetically with your first findings or are they simply independent?

THE WITNESS: I have not considered that in the studies that I've done.

If you are asking for opinion or beyond the analysis, then I would answer. But in our analysis we didn't address that issue directly.

THE COURT: Thank you, sir.

BY MR. KRAMER:

Q. Can you tell me whether or not the methodology used in Exhibit 18 is that methodology that's usually recognized by other human geographers and demographic individuals?

A. Yes. In fact, it goes beyond just my field. It would be used in any scientific inquiry. These are elementary statistics used by most scientists.

Q. And with regards to Z scores of magnitudes over 7 -or 5, I mean, you indicated five is one chance in ten million of random probability?

A. Yes, that's true.

Q. When you have figures that you testified to, sometimes up to a 49 score, how many zeros would you be [P. 226] talking about?

A. I don't know the number of zeros but it's in the billions, I'm sure.

MR. KRAMER: Could I have one moment, your Honor?

THE COURT: Sure.

BY MR. KRAMER:

Q. Would you go back to Plaintiff's Exhibit 18 and go to page 3. Could you tell me what is the difference between a negative Z score and a positive Z score?

A. The negative and positive just indicate which number is larger. Essentially, in the case of the minus 23 it means the first number used in the calculation was actually -- the second number, I'm sorry. That the larger number was the second number used in the calculation when you subtract one from the other

THE COURT: Would you, for the record, indicate which one?

THE WITNESS: One subtracts the 79 percent from the 68 percent and gets a negative number.

BY MR. KRAMER:

Q. Other than that, it does not have any significance on the reliability?

A. Absolutely not. You could transpose the two numbers and get a positive number, which would be numerically the [P. 227] same otherwise.

Q. Thank you.

THE COURT: It's an arithmetic computation.

THE WITNESS: Yes, your Honor.

THE COURT: Mr. Arrington.

MR. ARRINGTON: Your Honor, if I could defer to Mr. Morrison first.

THE COURT: Sure.

CROSS EXAMINATION

BY MR. MORRISON:

Q. Mr. Salling, I have a few questions relative to the exhibits that you have been asked to identify. I believe the first exhibit has been marked as number 34. If you would take a look at number 34.

A. I don't think so. I have 18 and 35.

MR. KRAMER: 35.

BY MR. MORRISON:

Q. 18 and 35, I'm sorry. The first one is marked as 18, that's what I would like you to look at.

A. Okay.

Q. Before preparing this report marked as Plaintiff's Exhibit Number 18, have you ever, in your career, ever prepared a similar report comparing or making a comparison of the differences in race and the presence of children

[P. 228] between a general renter market and a target market for an apartment development?

A. Not for that specific market grouping.

Q. Have you ever done an analysis -- when you say not "for that specific market grouping," what are you talking about?

A. I've done, numerous studies of the differences in populations or samples, some of which are based on race; whether or not the racial

composition in one geographical area or one aspect is different than a racial composition in another sample or group. I've done that numerous times, never with this particular market segmentation comparison.

Q. My question is, have you ever done, as you call it, a market segmentation comparison? Have you ever, before preparing this report, done a market segmentation comparison for race and children?

A. I know not for children. I don't recall any study of that for race. I honestly couldn't remember specifically, but I wouldn't doubt that I had.

Q. All right. Have you ever been qualified as an expert to testify as to the analytical differences in a report such as you prepared in this case, Plaintiff's Exhibit Number 18, ever in your lifetime?

A. Not in a court such as this.

Q. In any courtroom have you? [P. 229]

A. Not in any courtroom.

Q. Not in any courtroom?

A. Not in any courtroom.

Q. Okay. Turn to Exhibit Number 35, I believe. And that is another report that you have prepared analyzing differences in racial composition between the City of Cuyahoga Falls and Summit County, Ohio.

Prior to your preparing this report for this case, have you ever prepared a similar report comparing the racial composition of any city or community within Summit County?

A. Not within Summit County.

Q. You have done it in Cuyahoga County?

A. Yes.

Q. In connection with any of those cases where you have ever prepared such a comparison, have you ever been qualified as an expert to testify on those matters in any court in the country?

A. Not in any court.

Q. Let me understand something, and we'll take Plaintiff's Exhibit Number 18 first of all.

In Plaintiff's Exhibit Number 18, if I understand correctly, what you have done is defined your general renter market as any individual?

A. Household.

[P. 230]

Q. Any household who would pay $200 or more per month for rent?

A. Correct.

Q. So conceivably there would be people in this courtroom that would fit within that general rental market?

A. Correct.

Q. And that general rental market would include virtually every household in Summit County that pays or rents for $200 plus per month?

A. That's correct, for the Summit County portion of the analysis.

Q. I understand you did two portions of the analysis, you did one in Summit County and one you called the north central region?

A. Yes.

Q. Let's stay with Summit County so we don't confuse the two studies.

So it's clear, what you basically did is two identical analyses using two different market areas. One is a four census region, which is Summit County, and one is a five census region?

A. No.

Q. Go ahead?

A. One is a four census county region and the other is simply all of Summit County.

[P. 231]

Q. Summit County is Summit County; and the four census county region is what you qualified as the north central region?

A. Yes.

Q. Let's stick with Summit County for the moment.

If I understand what you have done, you have identified, through your census data, the number of households in Summit County that pay more than $200 a month in rent?

A. Yes.

Q. And I believe that those numbers, as contained on the chart that you were testifying from, is about 49,000 families?

A. That's correct.

Q. Right?

A. That's correct.

Q. 49,000 families.

Then what you have done is you have taken some additional criteria, and that is a low income threshold and race, and you have carved out of that general market those individuals who fall within that subset of income threshold and race?

A. Not quite.

Q. Okay.

A. We subset the general renter market into a subset [P. 232] market not based on race. We compared race later, but based on whether they lived in multi-bedroom units and whether they met the income requirements of the development.

Q. You are right, I apologize.

So it's clear, after you identify the general rental market you then identified that subset of the general rental market that would meet the income threshold and would rent more than a single bedroom apartment?

A. Yes.

Q. And what you concluded is -- and if you want to look at your chart -- that within that subset in Summit County there were approximately 13,400 people within the subset identified by the income threshold and the multi-bedroom unit?

A. That's correct.

Q. So essentially, about a third of the total general rental market was represented by this, if you will, target market?

A. I believe it's more than a third but -- or less than a third, but yes. I think 13 thousand is something less than a third of 49,000.

Q. Okay. 30 percent?

A. Okay. I won't quibble.

Q. Okay. So is 30 percent a fair estimate?

[P. 233]

A. Get my calculator out and tell you exactly that-- 25, 30 percent.

Q. Okay, 25 to 30 percent.

And it appears that of that 25 or 30 percent of the total general rental market the

black population represents 25 percent, correct?

A. That's correct.

Q. If we look at the central northern Summit County analysis the numbers are a little different, which seems to suggest that there is a larger number of renters meeting the thresholds that you have described, that is the income and multi-bedroom. There are more individuals in Summit County than there are in the central northern Summit County?

A. Sure.

Q. What I don't understand is, does the central northern Summit County include boundaries outside of Summit County?

A. No.

Q. No?

A. No.

Q. All right. Explain, if you will, so I understand, if you look at table 1, which is for central northern Summit County, you show that there are among the African American population approximately 7,764 people in the general renter market?

[P. 234]

A. Yes.

Q. In Summit County, you show that there are 7,925 African Americans in the general renter market?

A. Yes, except they are households and not individuals.

Q. Households, I'm sorry.

A. Yes.

Q. Does that then tell me that other than the central and northern Summit County that there are less than 200 African Americans in the general renter market outside of central northern Summit County?

A. Yes. It implies that's an approximate number, yes.

Q. Where is the boundary line for the central northern Summit County?

A. I have a map I'm consulting.

The division line is Copley Township and Norton on the western side of the county. So that Copley Township is included in the central northern study area and Norton is not. And on the eastern side of the county, if I can read my map correctly, it looks like Tallmadge is the northern most community. The line basically goes straight across east, west, and all of Akron, however, is included in the central northern.

Q. Can you tell from that map whether or not the line that segregates the central and the southern is Route 224, otherwise known as Waterloo Road? Can you tell from that [P.235] map?

A. No, I can't.

Q. But suffice it to say, that in the southern part of Summit County there are less than 200 individuals in the general renter market that are African American, based upon your data?

A. Households. And it's an estimate.

Q. Households?

A. Yes.

Q. Do you know how many African Americans are within the City of Cuyahoga Falls that fall into the general renter market?

A. I didn't make that calculation, no.

Q. So we don't know whether or not the City of Cuyahoga Falls may indeed have more African Americans in the general renter market than does the entire southern portion of summit County, do we?

A. Except one can look at the population and look at the number of blacks in the city.

Q. Okay.

A. Which is 518.

Q. 518?

A. Yes.

Q. So we know then that there are at least -- well, we know there are only 200 some families in all of southern [P. 236] Summit County, right?

A. 200 something households meeting that criteria.

Q. Approximately?

A. Yes.

Q. Now going to page 3 of your report and going on to page 4. There you have done a similar analysis, however you have used instead of race as the variable, you have used households with and without children, correct?

A. That's correct.

Q. Look at table number 4 for a moment. And there you show that within Summit County in the general renter market there are some 50,000 people that would be with and without children but would be part of the renter market?

A. Households.

Q. Households, yes. Correct?

A. Yes.

Q. Did you do an analysis for his Honor to describe how many of those with or without children also fall among the group of African American?

A. No.

Q. Pardon?

A. No.

Q. You weren't asked to do that?

A. No.

Q. The development target market for Summit County [P. 237] relative to households with and

without children demonstrates that those meeting the criteria -- again this is the income criteria and the need for multiple bedroom housing?

A. Those living in multiple bedroom housing.

Q. Those living in multiple bedroom housing is about 13,721 people. Or again maybe -

THE COURT: Households.

BY MR. MORRISON:

Q. -- households, or about 20 percent?

A. About 26 percent, I would say.

Q. And of that 26 percent, 42 percent of those are people that do not have children, correct?

A. That's correct.

Q. Let's deal with your analysis on the issue of race.

You have indicated that the Z score tells you, as a statistician, that it is not by random chance -- your result is not by random chance?

A. That's correct.

Q. Are you able to tell his Honor why there are more or less African Americans in the development target market as opposed to the general rental market families?

A. Not from this analysis.

Q. Pardon me?

A. Not from this analysis.

[P. 238]

Q. So, when you say it's not by random chance, what you are telling us is, if you were to go and do this study again you would expect to find very similar results, that this wasn't just a chance calculation?

A. That's correct.

Q. Okay. You are not suggesting to this court or anyone here that you have any way of explaining why there are more or less people that fit into one category or the other?

A. Not from this analysis.

Q. And if in fact, if we place the limitation using the variables that you used, and that is when you defined your development target market you used an income criteria, and you used a multi-bedroom criteria?

A. Yes.

Q. If we apply that criteria to a general renter population, would you agree that clearly there is a large segment of that population that is not going to fit in your target group if they don't have children?

A. The difference between the two columns of numbers is the number I think you are alluding too.

Q. Precisely. What I'm saying is, if you change your development target market variables you will have a completely different set of numbers if you were to go back to your office and recalculate using some different variable?

[P. 239]

A. You would have some different number's perhaps.

Q. All right. What meaning -- I guess is what I'm trying to drive at, what meaning is there to the fact that you take a segment of the population households that rent and then you extract from that group a subset that is limited by virtue of income and multi-bedroom use?

A. I believe the answer is that the type of housing that's being built in this proposed development is designed for that market segment that we tried to measure.

Q. Well, certainly I think we would agree that we wouldn't build a three or four bedroom apartment for single living, correct?

A. Correct.

Q. Now, you had, just before Mr. Kramer was concluding with his questioning of you, you were describing the Z score and the significance of the positive or the negative. Does it matter whether it's a positive or negative Z score?

A. Only if you are concerned about which number is larger than the other.

Q. I'm not sure I understand that.

A. So, an example, is the--

Q. Let's look at table number 4 where they are identical. On page 4, table number 4, it says one is a negative 5334 and the other is a positive 5334. What is the significance of that?

[P. 240]

A. All it means, we -- in the calculation of the Z score, we were asking -- first of all, on the Z score we are asking are the two proportions different? In order to come up with a number of difference you subtract one from the other. And then you ask is that difference greater than zero?

And so if you subtract one number from the other number and the first number is larger you are going to have a negative number as a result. The calculation, the number, the raw number will be the same.

Q. Okay. But you are saying that if it's greater than zero. What if it's a negative number?

A. This negative number of minus .53 simply means that 67.14 is a larger number than 42.05.

Q. And the other one, which is 53.34 just means that the 32 is less than the 57?

A. That's correct.

Q. Okay, I think I understand something. Can we look at this chart for a moment? Maybe the

court can see this. And let's just take any one of these.

What you are telling us, I believe, is that if we take this number and subtracted this number we get this number?

A. No.

Q. No?

[P. 241]

A. No

Q. All right. This number being a negative tells us that this number is larger than this number?

A. That's correct.

Q. And this one with a positive tells us that this number is smaller than this number?

A. That's correct.

Q. And what you are looking for to determine how--whether or not there is a random difference between this percentage and this percentage is the size of this number?

A. That's correct.

Q. Okay. When you use the word "random" in that regard all you are saying is that because of the size of this number, the fact that this number is larger than this number is not just a random sampling?

A. Its not a random event; that something caused it.

Q. And you don't know what caused it?

A. No, I don't.

Q. For example, it may be that if there is an ethnic community, there may be certain ethnic communities where people want to live in an ethnic neighborhood, correct?

A. I suppose so.

Q. It may be that certain areas don't offer the same amenities that other areas offer, correct?

A. That's true. I'm sure there are lots of reasons, [P. 242] lots of explanations.

Q. But you are not here to tell us what those reasons are, is that correct?

A. That's correct.

Q. You can't tell us that any of those reasons relate to discrimination against families or children, can you?

A. Not based on this study.

Q. And you can't tell us that any of those reasons are based upon race discrimination, can you?

A. Not based on this study.

Q. Your second -- I'm almost done. Your second study which you did over this past weekend, I believe you say you got the assignment on November 16th?

A. Yes.

Q. And you were able to fax a copy of this report or get a copy of the report prepared on November 18th, right? Which was what, Monday?

A. Yes.

Q. Okay. Is it fair' to say that your conclusion in that report is merely that there is a larger percentage of blacks in Summit County than there is in Cuyahoga Falls?

A. By a very wide margin.

Q. And you would agree that if you did a similar study on any other segment of Summit County you may find similar results for such places as Stow, Monroe Falls, Green [P. 243] Township, Norton, Barberton, correct?

A. I'm sure that there are some that would have similar differences, some which have fewer differences, and some where the inverse is true, there is a higher proportion of blacks.

Q. And some where the inverse would be true where you would have a larger concentration, if you will, of African Americans?

A. Yes.

Q. And if you were to break it down further and divide it among African American, Caucasian, Asian, Hispanic, you might find a different percentage break out, correct?

A. Yes. We can quantify racial and ethnic segregation in many different places.

MR. MORRISON: I have no further questions. Thank you.

CROSS EXAMINATION

BY MR. ARRINGTON:

Q. Dr. Salling, how long have you been the Director of the Northern Ohio Data and Information Service?

A. Since 1982.

Q. So I understand your report -- and I'm going to tell you right now I don't understand your report -- you are referring to the terms "general renter market" and [P.244] "development target market." Do I understand it correctly that these are individuals who are currently renting their homes?

A. In the 1990 census data, yes.

Q. So we are talking about 1990 data?

A. That's correct.

Q. These aren't necessarily people who are looking for an apartment, are they?

A. That's correct.

Q. They are people currently renting?

A. That's correct.

Q. As of 1990 do you have any experience, training, education, in terms of the marketing of real estate?

A. Not the marketing, but my area of specialization is population migration. I look at why people move, where they do, and what numbers.

Q. You haven't analyzed this?

A. I haven't analyzed the specific numbers in this situation, no.

Q. You indicated in your report, I believe, that you made a decision to exclude the people who are paying less than $200 in rent?

A. Yes.

Q. And why did you do that?

A. Because we didn't feel that that population [P. 245] represented a sizable portion of the market for the development that we are talking about. We also were concerned that a fair number of those wouldn't be actually in the actual housing market. That is to say, they may be paying that rent as a nominal fee for living at home or other similar kinds of arrangements; they are not part of the general housing market as much, at least.

Q. Wouldn't it also be true, though, for people who are looking for an apartment, such as I was back in 1982, they would be living at home and not paying any rent?

A. That's true.

Q. And you would have no way of knowing who those people are?

A. That's true. In a way, this study represents a minimal approach to the data.

Q. When you made the decision to exclude the people who were paying less than $200 in rent, did you know what the number of those people were?

A. We did look at them briefly, yes.

Q. Explain to me what -- if I can find it now -- the public use micro data sample is?

A. It's a special computerized data base that the Census Bureau provides to people to analyze the data or to use the data. Most census data is released in what's called a summary form. That is to say, they will tell you the [P. 246] number of persons that meets certain categories of attributes, number of householders by race, or persons by age, and that sort of thing.

That kind of data is limited in that you can't do your own cross tabulation of the information. You don't have the raw data with which to ask questions, such as how many households meet specific criteria using other variables and data. And that's why we had to use the public use micro data samples. We had to target certain groups based on those criteria and they weren't available to us in the summary files.

Q. So I understand, though, the actual numbers and data that is in the public use micro data sample, that's in the 1990 census as well?

A. Yes, that's correct.

Q. And as I was sitting there I was trying to remember what I filled out on the census. Did I fill out forms telling you how many bedrooms were in my home and things of that nature?

A. Yes. The census was taken in actually two parts. Some questions were asked of every house and every individual such as age, house, race, sex, relationship to the households and that sort of thing. Another set of questions like income, occupation, ancestry and some other things were asked on a sample basis.

[P. 247]

Q. Looking back to 1990, I recall numerous television advertisements encouraging people to send in the data information. I take it that it's always the difficulty of getting people to respond to the census?

A. Yes. Yeah, the Census Bureau has had a recognized program of trying to reduce the so-called under count. And in every decennial census since, at least 1960 the under count has been reduced.

It depends on which segment of the population you are talking about. In general it's been declining.

Q. Is there any way of knowing what the under count was from the 1990 census?

A. There is a way of estimating it. The Census Bureau has elaborate methodology where they go in and resample in other areas in very intensive was to find out what the population characteristics are. And when they compare that intensive sampling and study with the results from the census, they can estimate the degree to which their data are incorrect or insufficient or in which there is an under count.

Q. If I could, I want to show you the blowup, and I believe this is of Exhibit 18. You had indicated that this table 4 stating central northern Summit County really should read Summit County?

A. That's correct.

[P. 248]

Q. When did you first discover that error?

A. This morning.

Q. And you were talking about, I believe, there are some errors concerning with children and without children. When did you discover those?

A. This morning.

Q. Prior to this morning, had you proofread your reports?

A. Yes, I had.

Q. And those errors simply got by you?

A. Yes. Actually I proofread the documents in several forms. And one of the final steps was moving it from the table of information from a spreadsheet, which I had proofed and evaluated and made sure that it was correct, and then I moved it into a word processing package as a table. And because the limitations of when I moved from one software system to another, I had to retype the label "with children" and "without children" and I simply mistyped them.

Q. Let me make sure I understand one other thing.

I believe when Mr. Morrison was asking you about the northern central Summit County and the southern part of Summit County, you were talking about the wide disparity of numbers with black households, you made a comment that these numbers are estimates?

[P. 249]

A. That's correct.

Q. Is that true of all the numbers that are in this report, these are all estimates?

A. That's correct. That's true of all the census data.

Q. The northern central Summit County, does that include Barberton?

A. I believe so, yes. I'm sorry. Barberton, yes. Barberton, let me make sure.

Q. Would it be okay if I looked at the map that you are looking at?

A. Sure. It's small, that's why I'm having a hard time finding the community names.

I'm sorry, it does not include Barberton.

MR. ARRINGTON: Can we mark this as an exhibit?

MR. KRAMER: I have no objection, your Honor. It's been identified by the witness.

MR. ARRINGTON: Is this part of the report? It's not in my copy.

MR. KRAMER: No, it's not part of the report.

THE COURT: I know where Barberton is, if that's your point.

MR. ARRINGTON: I understand. There are other communities. I think it's important to know where the boundary line is.

Q. Just so the record is clear, I'm now going to hand [P. 250] you what has been marked as Defendant's Exhibit A and ask you to identify that?

A. That's a map of Summit County showing -- with communities labeled, some other labeling -- shows the four geographic areas to which the public use micro data sample apply.

Q. And is the information on that map accurate?

A. Sure. Certainly.

Q. And is that a true and accurate copy of the original of that document, wherever it may be?

A. Yes.

MR. ARRINGTON: I have nothing further at this time, your Honor.

As I indicated, though, on Monday I received this report, Monday morning. I've not had -- or Monday afternoon. I've not had an opportunity to consult with my own expert, whoever that might be. And so at this point I can't really say for sure I don't have anymore questions because I don't know enough about this report to be able to say that.

THE COURT: Sir, I don't mean to beg a question, but I want to be accurate.

The formulation of the Z score which you show on each of the charts, is a function of what?

THE WITNESS: It is a comparison of two [P. 251] proportions and the sample size that -- or the number of observations used to come up with that proportion.

THE COURT: What numerical scores or sets would I use to arrive at the 2316 Z score?

THE WITNESS: You would use the two proportions being prepared.

THE COURT: Which in this case are what?

THE WITNESS: If we look at table 1, for example, if we are comparing the 29.6 percent, which is the percentage of black in the development target market, to the 18.49 percent, which is the percent black in the general renter market.

The question we are asking is: Are those two percentages really different from one another? That is to say, if you subtract one from the other do you have a value that's close to zero? If they are the same you would get a difference of zero.

THE COURT: How do you configure the 2377.

THE WITNESS: The 2377 is calculated using that formula, your Honor. And it is -- the top portion of that formula, you will see, is one proportion minus the other proportion, and that's all divided by a continuation of that formula which includes more of the percentages and sample size from which those two proportions were gathered.

[P. 252]

THE COURT: It seems to me that was part of what Mr. Morrison's question was. Are you saying that there is a formula I can approach to this that -- at least I don't have at this point, I'm not faulting you, but I want him to be able to understand.

THE WITNESS: I'm sorry, I don't understand the question.

MR. KRAMER: I'm sorry, your Honor. I wonder if -- is page 4 of Plaintiff's Exhibit 18, is that the formula?

THE WITNESS: That's the formula for the Z score.

THE COURT: Fine, that will answer it. Thank you.

That applies in each case?

THE WITNESS: That's true.

THE COURT: Okay.

I'm sorry, Mr. Schultz. Do you have anything?

MR. SCHULTZ: No, your Honor.

THE COURT: Mr. Kramer?

MR. KRAMER: Your Honor, we have no further questions for the witness.

THE COURT: Thank you, doctor.

THE WITNESS: Thank you.

MS. CITRINO: Plaintiffs call Councilman George ...

[Testimony of Lee Minier]

[p. 283]

Q. Will you ever do that again?

A. Never again.

Q. Why not?

A. It's cost me money, it cost me in attorneys fees because I had to get a motion to remove me from a deposition because I was going to be out of town. I couldn't get a hold of the attorney that filed -- gave me the subpoena to begin with, so I couldn't get removed. had to get an attorney to file a motion to protect me. It's probably going to cost me $800 in attorneys fees. It's cost me a couple days work now.

We feel that the politicians really don't care about our situation and the concerns that we have raised and I've really become quite disgusted with the whole thing.

MR. ARRINGTON: Thank you.

THE COURT: Mr. Morrison.

CROSS EXAMINATION

BY MR. MORRISON:

Q. Mr. Minier, I just have a couple questions. I represent Mayor Robart in his individual capacity. I want to ask you a couple questions about the Mayor's involvement.

Did the Mayor orchestrate or schedule any of[p. 284] the meetings at any of the houses that you attended?

A. No, he did not.

Q. Did the Mayor initiate or come up with the idea of the citizens getting together and looking at the option of a referendum?

A. No, he did not.

Q. You talked about the fact that the Mayor discussed with some of the members of the referendum group the fact that the city had been through a referendum on prior occasions, correct?

A. Yes.

Q. Was that at the request of some of your members as to whether or not the Mayor could give you some details on what happened in that referendum?

A. It may have been, but I think he was just voicing some of his experience and how shocked he was that this had happened to him to begin with.

Q. That in fact a referendum had been used against the city?

A. Yes.

Q. And Greg Wagner had been the one that initiated that?

A. Yes.

Q. The Mayor had not been involved in initiating that prior referendum, had he?

A. Not that I'm aware of.

[p. 285]

Q. Do you recall a meeting where the Mayor came to one of the houses, had been invited in, and brought some videos or some photographs? Were you at any meeting where that occurred?

A. We were at a meeting, he had gone to one of the facilities I think that the Buckeye Foundation had developed.

Q. Okay.

A. And he had taken some videotapes. And we had invited him to one of our meetings. And when he came in he said he had some tapes in the car if we would like to see them. And we all had adamantly said we were not interested in seeing the tapes.

Q. But he did volunteer to let you see those videos, did he not?

A. Yes.

Q. The town meeting that was held, I believe in April when the petitions were handed out to be distributed or distributed for signature, do you recall that?

A. You are talking about the petitions for the referendum?

Q. Yes, I'm sorry, the petitions for the referendum.

Did the Mayor orchestrate that meeting?

A. No.

Q. All right. Did the Mayor participate in circulating [p. 286] petitions?

A. No.

Q. To your knowledge, did the Mayor sign any of the petitions?

A. Not that I'm aware of.

Q. You were asked about your comments concerning Prange Drive, and I believe you told us that you have been in the area of Prange Drive or on Prange Drive on one occasion, is that correct?

A. That's correct.

Q. Other than that one occasion where you physically observed what was going -- the going ons, if you will, on Prange Drive, are you familiar with any other aspect of Prange Drive based upon your living in close proximity to Prange Drive?

A. As far as?

Q. Anything about it?

A. I really don't know anything about Prange Drive other than the fact I drove down it that one time after our first meeting to see what was there.

Q. So anything that you would know or have heard about Prange Drive would be based upon someone else telling you something, hearsay?

A. It would be hearsay, yes.

Q. Mr. Minier, what was your personal overriding concern...

[Testimony of Don L. Robart]

[p. 335] ... First of all, is that statement contained on page 13 attributable to you?

A. Yes, it is.

Q. And on that statement, do you relay to City Council the fact that there had been -- that one only need look at the police blotter to know some of the problems on Prange Drive?

A. Yes.

Q. Now, the March 4th meeting was a City Council meeting and certainly you were invited and entitled to attend as Mayor, correct?

A. Yes.

Q. What about the March 18th, meeting. Was that also a City Council meeting?

A. The 4th and 18th are both what we call committee meetings. And the Planning and Zoning Committees would have met and discussed this issue.

Q. That's a public meeting, it's open and you are invited to intend?

A. Yes.

Q. And with regard to the North Hampton meeting that was at the Town Hall, was that a meeting you were invited to attend?

A. Yes.

Q. Mayor, did you personally ever take a leadership role [p. 336] in promoting the referendum in this case?

A. No.

Q. Did you do that? Did you did you ever, in your individual capacity, go out and circulate referendum petitions?

A. I did not.

Q. Did you ever go out and knock on doors and encourage people to circulate petitions?

A. I did not.

Q. Mayor, as you can best recall, including the meetings that you had with the residents in their homes and the public meetings that you attended, did you ever make any racially

discriminatory remarks about the Pleasant Meadows development?

A. I did not.

Q. Did you ever make any discriminatory remarks about families having children living in the Pleasant Meadows apartment?

A. I did not.

Q. Did you do that either in your individual or official capacity at any time?

A. I did not.

MR. MORRISON: I have nothing further, your Honor.

THE COURT: Mr. Arrington.

***

[The following was Introduced as Exhibit 18 in the Transcript of the Preliminary Injunction Hearing, dated November 19-21, 1996]

An Analysis of Differences in Race and Presence of Children Between the General Rental Market And the Target Market for the Apartment Development Proposed by Buckeye Community Hope Foundation In the City of Cuyahoga Falls, Ohio

By

Mark J. Salling, Ph.D.
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With Assistance from
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For

Fair Housing Law Clinic
3214 Prospect Avenue, East
Jeremiah Ensworth House
Cleveland, Ohio 44115-2600

November 18, 1996

Buckeye Community Hope Foundation, et al. vs. City of Cuyahoga Fall, et al.
Information required by Federal Rule 26(a)(2)(B)

1. Complete statement of all opinions to be expressed and the basis and reasons therefor:

Based on an analysis of racial and family composition in the region's existing multi-bedroom rental units and household income eligibility limits which match those of the proposed residential development, the addition of the residential development proposed by Buckeye Community Hope Foundation would, all other things being equal, enhance housing opportunities more for Blacks and families with children than it would for Whites and households without children. Conversely therefore, not building this complex of 72 rental units would have a disparate and negative impact on the housing opportunities of Black renter households and families with children. The statistical reliability of the empirical analysis is extremely strong. See the attached analysis in Appendex 1 for details.

2. The data or other information considered by the witness in forming the opinions:

The following methodology was used..

Source of Data

Data used in the analysis are from the 1990 Census of Population and Housing, Public Use Microdata Sample (PUMS) - 5 Percent Sample. These computerized person and household level data files permit the researcher to cross tabulate the Census variables as needed. Census hard copy publications

and data found in the Bureau's Summary Tape Files do not enable the researcher to identify customized categories of the population, such as Black households living in two-or-more bedroom units by income. The PUMS data do provide this capability though at the expense of geographic detail in the data. The researcher can only characterize demographic and housing attributes for population and household groups based on relatively large areas (totally greater than 100,000 in population). This limitation dictated the analysis area delineation described below.

Geographic Areas of Analysis

Analyses were performed using two market area definitions - one consisting of all of Summit County and the second, the Central-Northern region, consisting of the northern two-thirds of Summit County (see map).

The Central-Northern region consists of all of the City of Akron and the communities of Summit County lying to the north of the Norton City - Copley Township boundary on the west side of the County and north of the Mogadore Village - Tallmadge City boundary on the east side of the County. This area consists of three of the four Census-defined PUMS areas in the County (known as Public Use Microdata Areas or PUMAs). Cuyahoga Falls is located centrally within this area.

Defining the General Renter Population and the Development Target Market Population The following two groups of households were identified and their racial and household type (with and without children) were compared:

General Renter Market-

- renters paying $200 or more for rent. These households represent the larger potential market for rental housing; fewer than 15 percent of renter households payed less than $200 in the 1990 Census, and these are not likely to consider the Buckeye Community Hope Foundation housing development.

Target Market Population (i.e., income-eligible, multi-bedroom households)-

- renters paying $200 or more for rent, renting units with two or more bedrooms, and having incomes below the eligibility limits set for the development as specified below. Because 1990 census data represent 1989 incomes, the income estimates provided by the PUMS data have been adjusted by the Consumer Price Index (CPI) to more *accurately* reflect current income levels.

Household Size	Maximum Income
1 -person	$17,340
2-person	$19,800
3-person	$22,320
4-person	$24,780
5-person	$26,760
6-person	$28,740

This Target Market Population represents households that are the target market for the Buckeye Community Hope Foundation housing development.

3. Any exhibits to be used as a summary of or support for the opinions:

RACE

Central-Northern Summit County

Table 1

	General Renter Market	Percent	Development Target Number	Percent	z-score
White	33,263	79.22%	7,783	68.13%	-23.16
Black	7,764	18.49%	3,381	29.60%	23.77
Other	963	2.29%	260	2.28%	-0.11
Total	41,990	100.00%	11,424	100.00%	

There are proportionally more Black households who are in the Development Target Market (DTM) than in the General Renter Market in Central-Northern Summit County. This difference is a highly statistically significant as indicated by the extremely high z-score of 23.77.

Summit County

Table 2

	General Renter Market	Percent	Development Target Number	Percent	z-score
White	40,141	81.76%	9,714	72.39%	-22.14
Black	7,925	16.14%	3,422	25.50%	22.76
Other	1,028	2.09%	283	2.11%	0.11
Total	49,094	100.00%	13,419	100.00%	

The results for Summit County are very similar to those for the Central-Northern region.

HOUSEHOLDS WITH AND WITHOUT CHILDREN

Central-Northern Summit County

Table 3

	General Renter Market Number	Percent	Development Target Market Number	Percent	z-score
Without Children	40,141	81.76%	9,714	72.39%	-22.14
With Children	7,925	16.14%	3,422	25.50%	22.76
Total	49,094	100.00%	13,419	100.00%	

There are proportionally more households with children who are in the Development Target Market (DTM) than in the General Renter Market in Central-Northern Summit County. This difference is a highly statistically significant as indicated by the extremely high z-score of 49.64.

Central-Northern Summit County

Table 4

	General Renter Market Number	Percent	Development Target Market Number	Percent	z-score
Without Children	33,964	67.14%	5,770	42.05%	-53.34
With Children	16,624	32.86%	7,951	57.95%	53.34
Total	50,588	100.00%	13,721	100.00%	

Again, the results for Summit County are very similar to those for the Central-Northern region.

4. The qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years:

A resume providing credentials and publications of the witness is attached as Appendex 2.

Compensation is $1,400.00 for the research and written analysis, plus $35.00 per hour for time spent in, traveling to, and traveling from the place of testimony. Compensation is paid to Cleveland State University to compensate for staff time and related resource utilization.

The witness has not testified as an expert at a trial or by deposition within the preceding four years.

Appendex 1

An Analysis of Differences in Race and Presence of Children Between the General Rental Market And the Target Market for the Apartment Development Proposed by Buckeye Community Hope Foundation In the City of Cuyahoga Falls, Ohio

By
Mark J. Salling, Ph.D.
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Cleveland State University

November 18, 1996

This analysis concerns proposed development of an apartment complex in the City of Cuyahoga Falls by Buckeye Community Hope Foundation. The issue for which this analysis is preformed and presented is whether or not constructing the complex will have a disparate impact on housing opportunities for the Black population and for families with children.

Two questions are addressed.

First, is the development likely to include a disproportionate share of Blacks based on the combination of:

a) the number of bedrooms in the units; and

b)the income eligibility requirements for households living in the apartments?

Second, is the development likely to include a disproportionate share of households with children based on these same two considerations, i.e., number of bedrooms and income eligibility requirements for households living in the apartments?

In other words, the analysis compares race and presence of children in the household of those households that are eligible and perhaps likely to be renters in the complex with those in the general renter household population.

This analysis cannot determine who the renters in the development will be, nor can it determine the demographic and racial characteristics of the residents with any certainty. Many factors such as marketing strategies and other considerations are not within the scope of this analysis. What is considered is the relatively current (1990) demographic and racial compositions of renters in general and those for whom this development is designed to serve. Are there racial or family composition differences between such groups?

HYPOTHESES

The null hypotheses (NULL H1 and NULL H2) to be tested statistically are:

NULL H1: Black income-eligible households [1] are not a greater proportion of the multi-bedroom rental housing unit market than are Black households in the general rental housing market.

NULL H2: Income-eligible households with children are not a greater proportion of the multi-bedroom rental housing unit market than are household with children in the general rental housing market.

The two corresponding alternative hypotheses are:

H1: Black income-eligible households are a greater proportion of the multi-bedroom rental housing unit market than are Black households in the general rental housing market.

H2: Income-eligible households with children are a greater proportion of the multi-bedroom rental housing unit market than are households with children in the general rental housing market.

In inferential statistics, only null hypotheses can be rejected. If the null is accepted then the possibility of a true alternative hypothesis is in serious doubt; if the null hypothesis can be rejected, then the alternative is left as potentially true.

---

[1] Race of household in this analysis is determined by the race of the householder in the census data.

METHODOLOGY

The following methodology was used to test these hypotheses.

Source of Data

Data used in the analysis are from the 1990 Census of Population and Housing, Public Use Microdata Sample (PUMS)-5 Percent Sample. These computerized person and household level data files permit the researcher to cross tabulate the Census variables as needed. Census hard copy publications and data found in the Bureau's Summary Tape Files do not enable the researcher to identify customized categories of the population, such as Black households living in two-or-more bedroom units by income. The PUMS data do provide this capability though at the expense of geographic detail in the data. The researcher can only characterize demographic and housing attributes for population and household groups based on relatively large areas (totally greater than 100,000 in population). This limitation dictated the analysis area delineation described below.

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boundary on the west side of the County and north of the Mogadore Village - Tallmadge City boundary on the east side of the County. This area consists of three of the four Census-defined PUMS areas in the County (known as Public Use Microdata Areas or PUMAs). Cuyahoga Falls is located centrally within this area.

Defining the General Renter Population and the Development Target Market Population The following two groups of households were identified and their racial and household type (with and without children) were compared:

General Renter Market -

- renters paying $200 or more for rent. These households represent the larger potential market for rental housing; fewer than 15 percent of renter households payed less than $200 in the 1990 Census, and these are not likely to consider the Buckeye Community Hope Foundation housing development.

Target Market Population (i.e., income-eligible, multi-bedroom households) -

- renters paying $200 or more for rent, renting units with two or more bedrooms, and having incomes below the eligibility limits set for the development as specified below. Because 1990 census data represent 1989 incomes, the income estimates provided by the PUMS data have been adjusted by the Consumer Price Index (CPI) to more accurately reflect current income levels.

Household Size	Maximum Income
1 -person	$17,340
2-person	$19,800
3-person	$22,320
4-person	$24,780
5-person	$26,760
6-person	$28,740

This Target Market Population represents households that are the target market for the Buckeye Community Hope Foundation housing development.

Statistical Test

The hypotheses are addressed using a test of proportions. This test uses the normal distribution to evaluate whether the difference between two proportions is statistically larger or smaller than 0. The computed statistic is the z-score, and it is calculated as follows:

$$z = \frac{p1 - p2}{\mathbf{SQRT}\left(\frac{(p1*(1-p1))}{n1} + \frac{(p2*(1-p2))}{n2} \right)}$$

where p1 = proportion 1,

p2 = proportion 2,

n1 = the sample size of proportion 1, and

n2 = the sample size of proportion 2.

The z-score indicates the confidence with which one can say that the two proportions are indeed different and that one is greater than the other. For reference to the results presented below, a computed z-score in excess of 2.0 means that one can be 95 percent sure that the observed difference is not due to random chance. A z-score of 5.0 means that the chance that the proportions are only randomly different is less than one in 10 million.

RESULTS

RACE

Central-Northern Summit County.

Table 1

	General Renter Market	Percent	Development Target Number	Percent	z-score
White	32,263	79.22%	7,783	68.13%	-23.16
Black	7,764	18.49%	3,381	29.60%	23.77
Other	963	2.29%	260	2.28%	-0.11
Total	41,990	100.00%	11,424	100.00%	

There are proportionally more Black households who are in the Development Target Market (DTM) than in the General Renter Market in Central-Northern Summit County. This difference is a highly statistically

significant as indicated by the extremely high z-score of 23.77.

Summit County

Table 2

	General Renter Market	Percent	Development Target Number	Percent	z-score
White	40,141	81.76%	9,714	72.39%	-22.14
Black	7,925	16.14%	3,422	25.50%	22.76
Other	1,028	2.09%	283	2.11%	0.11
Total	49,094	100.00%	13,419	100.00%	

The results for Summit County are very similar to those for the Central-Northern region.

HOUSEHOLDS WITH AND WITHOUT CHILDREN

Central-Northern Summit County

Table 3

	General Renter Market Number	Percent	Development Target Market Number	Percent	z-score
Without Children	40,141	81.76%	9,714	72.39%	-22.14
With Children	7,925	16.14%	3,422	25.50%	22.76
Total	49,094	100.00%	13,419	100.00%	

There are proportionally more households with children who are in the Development Target Market (DTM) than in the General Renter Market in Central-Northern Summit County. This difference is a highly statistically significant as indicated by the extremely high z-score of 49.64.

Central-Northern Summit County

Table 4

	General Renter Market Number	Percent	Development Target Market Number	Percent	z-score
Without Children	33,964	67.14%	5,770	42.05%	-53.34
With Children	16,624	32.86%	7,951	57.95%	53.34
Total	50,588	100.00%	13,721	100.00%	

Again, the results for Summit County are very similar to those for the Central-Northern region.

CONCLUSIONS

Based on an analysis of racial and family composition in the region's existing multi-bedroom rental units and household income eligibility limits which match those of the proposed residential development, the addition of the residential development proposed by Buckeye Community Hope Foundation would, all other things being equal, enhance housing opportunities more for Blacks and families with children than it would for Whites and households without children. Conversely therefore, not building this complex of 72 rental units

would have a disparate and negative impact on the housing opportunities of Black renter households and families with children. The statistical reliability of the empirical analysis is extremely strong.

[The following was Introduced as Exhibit 23 in the Preliminary Injunction Hearing, dated November 19-21, 1996]

Buckeye Community Hope Foundation

947 East Johnstown Road, Suite 221
Gahanna, Ohio 43230
(614) 337-9718
FAX (614) 475-0348

June 7, 1995

Mayor Don Robart City of Cuyahoga Fails
2310 Second Street
Cuyahoga Falls, OH 44221

Dear Mayor Robart:

It was a pleasure speaking with you last week concerning our planned development on Pleasant Meadow Boulevard in Cuyahoga Falls.

Prior to the filing of an application with the Ohio Housing Finance Agency for low-Income Housing Tax Credits, as I'm sure you are aware, the applicant is required to notify the local executive political official. The purpose of this letter, as well as last week's phone call, is to apprise your office of our proposed housing development, Cuyahoga Terrace Apartments.

The development of Cuyahoga Terrace will be controlled by Cuyahoga Housing Partners Inc. (CHPI), a corporation registered to do business in Ohio. CHPI

is the Managing General Partner of Buckeye Community Three limited Partnership, an Ohio limited partnership. This partnership has been formed to develop affordable housing in Cuyahoga and plans to use Low-income Housing Tax Credits to provide equity for" Cuyahoga Terrace. The principal of Cuyahoga Housing Partners Inc. (Buckeye Community Hope Foundation) is very experienced and competent in the development of affordable housing, with projects spanning several states over 4 years.

The proposed development will be located in the northeast section of your city on Pleasant Meadow Boulevard, just west of Wyoga Lake Road. Cuyahoga Terrace is being designed to consist of 72 apartments on approximately 6.1 acres that is currently zoned for this use. The units will be 2 and 3 bedroom apartments.

Again, thank you for your time last week. I enjoyed our conversation and look forward to meting with you in the future.

Sincerely,

/s/_____

Steven J. Boone

[The following was Introduced as Exhibit 26 in the Preliminary Injunction Hearing, dated November 19-21, 1996]

FOLD OUT EXHIBIT

POPULATION PROFILE FOR SUMMITT COUNTY, OHIO

1990 Minor Civil Divisions

Population Profile for Summit County, Ohio
1990 Minor Civil Divisions

	County Total	Akron City	Barberton City	Bath Twp.	Boston Twp.	Boston Heights Village	Clinton Village	Copley Twp.	Coventry Twp.	Cuyahoga Falls City
POPULATION	514,990	223,019	27,623	9,015	1,879	733	1,175	11,130	11,265	48,950
SEX										
Males	246,590	105,192	12,923	4,514	960	358	567	5,357	5,457	23,179
Females	268,400	117,827	14,700	4,501	919	375	608	5,773	5,808	25,771
AGE GROUPS										
Under 5 years old	36,096	16,868	1,977	572	152	55	70	690	614	3,342
5 to 17 years old	89,693	37,683	4,988	1,775	307	126	222	1,936	1,716	7,775
18 to 20 years old	23,182	12,098	1,157	313	69	30	45	358	400	1,697
21 to 24 years old	29,322	15,474	1,476	336	85	32	54	478	545	2,668
25 to 44 years old	184,820	69,714	8,262	2,631	658	243	359	3,708	3,729	16,734
45 to 54 years old	62,100	18,927	2,393	1,436	236	88	147	1,340	1,278	4,537
55 to 59 years old	23,265	8,857	1,176	539	85	27	52	505	554	2,098
60 to 64 years old	25,495	10,227	1,528	503	83	33	62	480	661	2,609
65 to 74 years old	42,921	19,256	2,750	647	124	76	109	775	1,191	4,572
75 to 84 years old	21,391	10,445	1,461	216	67	18	44	526	497	2,249
85 and over	6,902	3,470	457	47	11	5	10	334	110	871
Under 18 years old	125,789	54,551	6,965	2,347	459	181	292	2,626	2,330	11,117
65 and over	71,214	33,171	4,668	910	202	99	163	1,635	1,798	7,492
RACE										
White	446,902	164,493	25,987	8,769	1,865	724	1,165	10,066	11,174	48,017
Black	61,185	54,656	1,453	96	4	2	3	899	35	518
American Indian, etc.	1,065	603	75	3	5	0	4	8	48	65
Asian, etc.	4,989	2,701	79	141	3	6	1	141	31	306
Other	849	568	29	6	2	1	2	16	7	44
Hispanic Origin	3,017	1,601	92	63	6	7	0	64	55	209
Non-Hispanic Race										
White	444,821	163,549	25,923	8,713	1,861	718	1,165	10,022	11,128	47,848
Black	60,848	54,358	1,445	93	4	2	3	890	35	515
American Indian, etc.	1,021	578	75	3	5	0	4	6	45	64
Asian, etc.	4,906	2,640	76	141	3	6	1	137	31	305
Other	379	292	12	2	0	0	2	7	1	11

98%

NOTES: (1) Racial Category "American Indian" includes American Indians, Eskimos and Aleuts.
(2) Racial Category "Asian" includes Asians and Pacific Islanders.
(3) Persons of Hispanic Origin can be of any race.
(4) Persons of "Hispanic Origin" and "Non-Hispanic Race" can be used together for comparison to datasets which consider Hispanic a separate racial category.

Source: U.S. Department of Commerce, Bureau of the Census, 1990 STF1A Dataset: Ohio. Prepared by the Center for Urban Studies, The University of Akron.

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Supreme Court, U.S.
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No. 01-1269

In the
Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART;
CITY ENGINEER GERALD DZURILLA, AND
CLERK OF COUNCIL GREGG WAGNER,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION;
CUYAHOGA HOUSING PARTNERS, INC.;
BUCKEYE COMMUNITY THREE L.P.; AND
FAIR HOUSING CONTACT SERVICE, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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Questions Presented for Review

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may the court inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal corporation?

2. In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?

3. Does the Due Process Clause of the Constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

List of Parties to the Proceedings in the Court Below

Petitioners

The petitioners are the City of Cuyahoga Falls, its Mayor, Don L. Robart, its former City Engineer, Gerald Dzurilla, and its former Clerk of City Council, Gregg Wagner. Petitioners were the defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Since this case was filed in 1996, both Gerald Dzurilla and Gregg Wagner have left their positions with the City. The individual defendants remain in this litigation in their official capacities only.

Respondents

The respondents are Buckeye Community Hope Foundation, a not-for-profit corporation that seeks to construct housing projects utilizing low-income housing tax credits, Buckeye Community Three, L.P., a limited partnership that operates the housing project in question, Cuyahoga Housing Partners, Inc., a for-profit corporation acting as the general partner of Buckeye Community Three, L.P., and the Fair Housing Contact Service, a not-for-profit housing advocacy organization. Respondents were plaintiffs in the District Court and appellants/cross-appellees in the Court of Appeals. Petitioners are unaware of any publicly held companies owning 10% or more of the stock of any of the respondent entities.

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Opinions Below

The Sixth Circuit Court of Appeals opinion was issued June 15, 2001, and is reported at *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001). Appendix to the Petition for Writ of Certiorari "Pet. App.", at 1a. The unreported decision of the District Court, per Judge Dan Polster, granting summary judgment in favor of petitioners, was rendered on November 19, 1999, and is reproduced at Pet. App. at 35a. An earlier decision of the District Court, per Judge Sam Bell, denying summary judgment, is reported *sub nom* at 970 F.Supp. 1289 (N.D. Ohio 1997) and reproduced at Pet. App. at 55a.

Statement of Jurisdiction

The Sixth Circuit Court of Appeals entered its judgment on June 15, 2001, and denied a timely filed petition for rehearing *en banc* on December 4, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions, which, unless otherwise noted, are reproduced in the Appendix to the Petition for Writ of Certiorari at 258a, *et. seq.*:

A. The First Amendment to the United States Constitution.

B. Section 1 of the Fourteenth Amendment to the United States Constitution.

C. 42 U.S.C. 3604.

D. Article IX, Section 2, Cuyahoga Falls Charter.

E. Cuyahoga Falls Ordinance 1128.08. Jt. App. at 20.

F. Cuyahoga Falls Ordinances Chapter 1144. Jt. App. at 21.

Statement of the Case and Facts

Petitioner, City of Cuyahoga Falls, Ohio, is a charter municipality having a population just under 50,000. Joint Appendix "Jt. App.," p. 293. Respondent, Buckeye Community Hope Foundation is a not-for-profit corporation that facilitates the construction of apartment projects utilizing federal low-income housing tax credits. For each project, it creates a for-profit corporation—in this case, Cuyahoga Housing Partners, Inc.—which acts as a general partner of a limited partnership—in this case, Buckeye Community Three, L.P.—which actually owns and operates the project. Throughout this brief, these developer respondents shall be referred to collectively as "Buckeye."

In June, 1995, Buckeye purchased property in the City on which it planned to construct a 72-unit low-income apartment project. Appendix to the Petition for Writ of Certiorari "Pet. App.," p. 3a. The magnitude of the project was such that a site plan for the project had to be approved before building permits could be issued. Cuyahoga Falls Ordinance 1128.08. Jt. App., p. 20. In January, 1996, Buckeye submitted an application for site plan review to the Cuyahoga Falls Planning Commission. The project received a favorable recommendation from the City's Planning Director, Louis Sharpe, and the matter was submitted to the Planning Commission for a public hearing on February 21, 1996. Jt. App., p. 26.

The public hearing was attended by various citizens who expressed questions and concerns about the project. Jt. App., p. 35. After hearing all of the comments, the Planning Commission unanimously approved the project, subject to nine stipulations recommended by Mr. Sharpe that Buckeye found acceptable. Jt. App., p. 26; Paragraph 21 of Buckeye's First Amended and Supplemental Complaint filed in the District Court Record at Document No. 115. Several of the conditions had to be met before Buckeye could obtain building permits for its project. For example, Buckeye had to construct a fence along its property line and post various bonds and fees before obtaining building permits. Jt. App., pp. 26, 204.

The matter was then presented to City Council pursuant to the City Charter, which requires that all Planning Commission decisions be submitted to council. Article VIII, Section 1.7, Charter, Jt. App., p. 13. The site plan was referred to council's Planning and Zoning Committee, which held public meetings on March 4 and March 18, 1996. Jt. App., pp. 133, 171. As before, both meetings were attended by citizens who voiced their questions and opinions about the project. While some opposed the project, others expressed support for it. Despite any expressed opposition, City Council approved the project on April 1, 1996, in the form of Ordinance 48-1996. Jt. App., p. 17. Mayor Robart silently approved the ordinance by not exercising his veto power. Pet. App., 93a.

The ordinance was scheduled to take effect on May 2, 1996. Pet. App., 94a. However, before that date came, Buckeye prematurely made application to the City Engineer for building permits. Jt. App., p. 53. The engineer issued a permit for the required fence since

an effective site plan approval is not required to construct a fence. *Id.*, p. 54. However, he withheld the remainder of the requested permits as the ordinance approving the site plan had not yet taken effect and because there were defects in Buckeye's application for permits. *Id.*; Jt. App., pp. 93-94, 205.

On April 29, 1996, before the site plan ordinance could take effect, citizens filed a referendum petition with the Clerk of Council signed by some 4,300 electors seeking the popular review of Ordinance 48-1996. Jt. App., pp. 10, 89. The referendum was facially neutral and supported by justifications other than racial bias. Pet. App., pp. 18a-19a. The clerk forwarded the petition to the Summit County Board of Elections for verification of the signatures as required by Article IX, Section 2 of the charter. Jt. App., p. 10. The board promptly verified the signatures and returned the petition to the Clerk of Council for further proceedings pursuant to the charter. *Id.* City Council then voted once again on the ordinance and, as before, approved the ordinance. *Id.*, p. 11. This meant that the referendum would proceed to a vote at the next general election in November, 1996. Article IX, Section 2, Cuyahoga Falls Charter, Jt. App., p. 15.

The filing of the referendum petition prompted the City Engineer to seek legal advice from the Law Director as to the effect of the referendum on his ability to issue permits. Jt. App., p. 53. On April 30, 1996, the Law Director advised in a memorandum that the filing of the referendum prevented the site plan ordinance from taking effect. Jt. App., p. 55. Accordingly, he opined that building permits could not be issued until the efficacy of the ordinance was determined. *Id.* In

reliance upon this advice, the engineer continued to withhold building permits. Jt. App., p. 54.

On May 1, 1996, Buckeye filed an action in the Summit County Common Pleas Court seeking to enjoin the referendum process as unlawful under the Ohio Constitution. Trial was held and, on May 31, 1996, the court entered final judgment upholding the legality of the referendum and denying the request for injunctive relief. Pet. App., p. 255a. Buckeye pursued appeals to the Ohio Ninth District Court of Appeals and Ohio Supreme Court, which resulted in further orders upholding the City Charter and referendum as lawful. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). Pet. App., pp. 246a, 214a. Throughout this two year period, the City obeyed these orders and honored the referendum and its preemptive effect on the City's ability to issue building permits. Then, on July 16, 1998, the Ohio Supreme Court reconsidered its decision and reversed itself, holding that the City Charter could not reserve the right to review administrative acts by way of referendum. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539, (July 16, 1998). Pet. App., p. 194a. As before, the City obeyed this judgment and, once Buckeye complied with all of the conditions of the site plan approval, the City issued building permits. The project has since been constructed.

On July 5, 1996, after the Common Pleas Court entered judgment denying injunctive relief and while its appeal was pending in state court, Buckeye filed this lawsuit in the District Court again seeking to enjoin the referendum election and further seeking monetary damages. District Court Record, Document No. 1. Named defendants included the City, its engineer, its

council clerk, and Mayor Robart, who was sued in both his official and individual capacities. Buckeye claimed that, by withholding building permits, the City violated the Equal Protection and Due Process clauses of the Constitution and the Fair Housing Act, Title VIII of the Civil Rights Act. 42 U.S.C. 3604, *et. seq.* Buckeye's constitutional claims were presented by virtue of 42 U.S.C. 1983.

In October, 1996, the City defendants and Mayor Robart filed motions for summary judgment raising primarily affirmative defenses. The District Court, per Judge Sam Bell, dismissed the case as to Mayor Robart individually, but permitted the case against the City to continue. *Buckeye Comm. Hope Found. v. City of Cuyahoga Falls*, 970 F.Supp. 1289 (N.D. Ohio 1997). Pet. App., p. 55a. At about the same time, Buckeye filed a motion for preliminary injunction to enjoin the referendum process. A three day hearing was held in November, 1996,—actually *after* the referendum election—and the court overruled the motion for preliminary injunction. District Court Record, Document No. 78. The evidence adduced at the preliminary injunction hearing was relied upon by both parties in later summary judgment pleadings.

Discovery continued after which the court invited summary judgment motions on the merits of the case. District Court Record Document No. 105. As the motion pleadings were being filed, Judge Bell retired and was replaced by Judge Dan Polster, who granted the City's motion for summary judgment. Pet. App., p. 35a. The court found no evidence that the City Engineer, who withheld building permits, was motivated by an intent to discriminate. It further found that the City's actions, being required by state court judgments,

were reasonable under the Due Process Clause, and that, given the overriding interests in preserving the right of referendum, Buckeye could not establish a disparate impact claim under the Fair Housing Act. Buckeye appealed to the Sixth Circuit Court of Appeals, which reversed. Without overturning any of the District Court's factual findings, the court held that the City could be held liable for honoring the referendum petition even though it was facially neutral, supported by justifications other than illegal discrimination, and upheld by three Ohio courts. *Buckeye Comm. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001). Pet. App., p. 1a. The City timely filed a motion for rehearing *en banc*, which was overruled on December 4, 2001. Pet. App., p. 192a. This Court granted the City's petition for a writ of certiorari on June 24, 2002.

Summary of Argument

Buckeye seeks to hold the City financially liable because its engineer withheld building permits that were necessary for the construction of Buckeye's proposed housing project. Of course, the withholding of a building permit is not illegal in itself. Rather, liability depends on proof that the City's withholding of permits was unlawful for some other reason.

The City had many valid reasons for withholding building permits. First, the site plan approval, which was a prerequisite to the issuance of permits, did not take effect, being preempted by a facially neutral, judicially upheld, referendum petition. Second, the City was not able to lawfully issue building permits until Buckeye itself fulfilled the conditions of the site plan approval. In short, the City's withholding of permits was required by law.

Buckeye claims that the withholding of permits was unlawful because it:

1. was motivated by an intent to discriminate contrary to the Equal Protection Clause and Fair Housing Act,
2. had a disparate impact on protected classes contrary to the Fair Housing Act, and
3. was without a lawful basis contrary to the Due Process Clause.

Each of these claims must fail as a matter of law, as properly found by the District Court.

Buckeye's claim of intentional discrimination must fail as the evidence is undisputed that the City Engineer, who made the decision to withhold permits, was not motivated by an intent to discriminate; rather, he was motivated by the necessity to follow the law as that law was affirmed by the courts of Ohio. While not disputing this truth, the Court of Appeals erroneously found grounds for intentional discrimination in the statements of a handful of citizens who opposed the project. However, in the referendum context, the law does not permit courts to inquire into motives of a handful of citizens to find an improper motive it can then impute to government actors who did not share that motive. Such an analysis would invalidate the most legitimate of governmental actions and, in the process, seriously chill the exercise of first amendment rights by the citizenry.

Buckeye's disparate impact claim must fail as the Fair Housing Act does not permit such a cause of action in the context of a facially neutral and judicially upheld referendum petition.

Finally, Buckeye's due process claim is without merit as Buckeye cannot establish that it held a protected property interest in the issuance of building permits or that the City was without a rational reason to withhold them.

Argument

I. Introduction

The issue at the heart of this case is whether a municipal corporation can be held liable in damages because its citizens exercise their constitutional rights to assemble, speak, and petition the government by way of referendum. Such liability is incompatible with the United States Constitution and prior decisions of this Court.

This Court has repeatedly protected the right of citizens to pursue referenda, stating that such involves "core political speech," which is "guarded by the First Amendment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). This Court even upheld a California constitutional provision that *requires* a referendum vote on *all* low-income housing projects. *James v. Valtierra*, 402 U.S. 137 (1971). In doing so, the Court stated at pages 141 and 143 that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice" and that the referendum process gives the people "a voice in decisions that will affect the future development of their own community." The only difference between this case and *James* is that the instant referendum was not automatically required, but rather the result of a petitioning of the government. That distinction should not give rise to liability. On the contrary, a referendum arising out of popular petition should

receive greater protection, simply because of the manner of its inception. *Meyer v. Grant, supra; Eastlake v. Forest City Enterprises, Inc., supra.*

The decision of the court below strays from this Court's protection of fundamental rights, instead permitting liability for nothing more than the people's pursuit of the democratic process. Little else could be more un-American.

Like *James v. Va'[illegible]ra, supra*, this case deals with the referendum *process*, as opposed to the result of a specific vote. This is an important distinction. While courts may overturn the *result* of a referendum, they are loathe to invalidate the referendum *process* itself. Indeed, under Ohio law, which controlled the City's actions here, "It is well-settled that this court will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature." *Jurcisin v. Cuyahoga County Bd. of Elec.*, 35 Ohio St.3d 137, 146 (1988) quoting *State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5 (1983); *State ex rel. Bond v. Montgomery*, 63 Ohio App.3d 728 (1989).

The fact that the Ohio Supreme Court ultimately reversed itself and invalidated the instant referendum petition on state law grounds does nothing to minimize the federal constitutional rights to freely speak and petition the government. The civil rights laws should not be construed so as to punish citizens for pursuing these most fundamental of constitutional rights. *Thornhill v. Alabama*, 310 U.S. 88 (1940). Yet, that is exactly the result of the decision below.

II. Intentional Discrimination – Equal Protection Clause and Fair Housing Act

In the context of a referendum petition, a court may not inquire into the motives of the citizenry to find a basis for liability against a municipality for alleged intentional discrimination, but must limit its inquiry to the motives of the municipality's decision-maker

A. General Intentional Discrimination Law

Intentional discrimination by government officials is actionable under 42 U.S.C. 1983 as being violative of both the Equal Protection Clause and the Fair Housing Act, 42 U.S.C. 3604, *et seq. Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989). Municipal corporations can be held liable under 42 U.S.C. 1983 when their actions are made pursuant to an official policy. *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978). Only city officials with final policy-making authority may subject their city to 1983 liability for the consequences of their actions. *Matthews v. Columbia*, 294 F.3d 1294 (11th Cir. 2002). Furthermore, "in enacting [42 U.S.C] 1983, Congress did not intend to impose liability on a municipality unless deliberate action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." *Bd. of County Commrs. of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 400 (1997). In deciding a claim of intentional discrimination under *Arlington Heights*, courts are to focus, not on the political acts of the citizenry, but rather "on the general question of what motivated the government official to

take the challenged action." *Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997).

Applying this law, the analysis of this case should have been very straightforward. The challenged action in this case was the City's withholding of building permits. In Cuyahoga Falls, the decision to issue building permits rests with the City Engineer. Jt. App., p. 53. The City admits that the engineer temporarily withheld building permits. However, Buckeye must also admit—as the District Court found—that there was no evidence that he was motivated in any manner by an intent to discriminate. Pet. App. 48a. Without such evidence, the City was entitled to judgment as a matter of law and the District Court properly so held. Such should have been the end of the matter.

B. The Improper Analysis of the Court of Appeals

The Court of Appeals, however, erroneously went on to examine not the motives of the City Engineer, but the motivations of a select group of citizens who expressed opposition to Buckeye's project. This analysis is contrary to this Court's holding in *Arlington Heights*, *supra*.

The material facts of *Arlington Heights* are very similar to the instant case. There, a developer wished to construct a low-income housing project and was met with public opposition. Citizens attended a village board meeting and expressed their opinions, just as citizens did in Cuyahoga Falls. However, unlike the Cuyahoga Falls City Council, which *approved* Buckeye's project over citizens' objections, the village board in Arlington Heights *rejected* legislation that was necessary for the proposed project. The developer

sued, claiming violations of the Equal Protection Clause and Fair Housing Act.

This Court held that the developer was required to prove intentional discrimination on the part of the *village officials* who defeated the legislation. 429 U.S. at 268-269. After considering the evidence, this Court concluded that the developer had failed in its burden of proof. The Court noted at 269:

> In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence "does not warrant the conclusion that this motivated the defendants."

In other words, this Court focused its attention on the motivations of the *government decision-makers* and did not consider the arguably discriminatory comments of the citizenry. See also *Contreras v. City of Chicago*, *supra*, where the court upheld a summary judgment in the absence of evidence that the government decision-makers shared the racial animus of various vocal citizens who sought and supported the action taken by the government.

The court below failed to follow *Arlington Heights* and considered the motives of a handful of citizens, justifying its analysis on sentiments expressed in *United States v. City of Birmingham*, 727 F.2d 560 (6th Cir. 1984). This justification is in error. Not only is this case factually different from *Birmingham*, but the court below improperly read the holding of *Birmingham*. If the court had properly applied the law of *Birmingham*, it would have affirmed the grant of summary judgment.

In *Birmingham*, government officials voluntarily held a non-binding referendum in response to widespread and substantial public discriminatory sentiment. Even so, the District Court in that case stated in a holding affirmed by the Court of Appeals that "a finding of discriminatory intent may not be based solely upon the bigoted comments of a few citizens." *United States v. Birmingham*, 538 F.Supp 819 at 828 (E.D. Mich. 1982). Rather, Birmingham's liability was based on a finding that city officials had acted "for the *sole purpose* of appeasing racially motivated opponents of the proposal." *Id.*, at 827. [emphasis added] By acting solely to appease those who were racially motivated, Birmingham's decision-makers adopted those racial motivations as their own. The same was true in *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982), another case relied upon by the Court of Appeals.

Such simply is not the case here. No one has ever alleged that the City Engineer withheld permits "for the sole purpose" of appeasing racially motivated citizens. Furthermore, unlike *Birmingham*, all of the comments relied upon by the court below were made in a *failed* attempt to persuade the Planning Commission and City Council to reject Buckeye's site plan. Despite these comments, both bodies *approved* the site plan. It was most improper for the court below to rely upon *Birmingham* and *Clarkton* as a basis of liability when the officials in Cuyahoga Falls took the very actions those cases would have required of them.

Underlying the decisions in *Birmingham* and *Clarkton* is the presumption that the government officials had lawful discretion *not* to take the offensive action. By choosing to exercise their discretion for the sole purpose of appeasing discriminatory motives, the

officials of those cities were subject to liability. Here, the City had no lawful authority to do other than it did. As the referendum petition was valid as to form and contained a sufficient number of signatures, the City had no choice but to honor it. *State ex rel. Bond v. Montgomery, supra.* The petition's validity was further upheld by all three levels of Ohio state courts. Thus, the City had no alternative but to give effect to the referendum, which effect included the withholding of permits. Such is vastly different from the exercise of discretion to voluntarily give effect to discriminatory motives, as was the case in *Birmingham* and *Clarkton*.

C. Five Citizens Acting with Allegedly Improper Motivations do not a Referendum Make

There were other flaws in the Court of Appeals' analysis of this case. In finding as it did, the court focused on the comments of only a literal handful of residents. Pet. App., p. 25a. However, those comments did not represent the concerns or motivations of the whole of the City's citizenry or the whole of those who signed the referendum petition or even the whole of those who spoke at the public meetings.

The City has just under 50,000 citizens. Jt. App., p. 293. Over 4,300 of them signed the referendum petition. *Id.*, p. 89. Between the three public meetings, approximately 60 non-governmental residents spoke. See the minutes of meetings at Jt. App., pp. 35, 133, 171. Of those 60, the Court of Appeals identified five by name that it believed were motivated by underlying racial animus, and even then the court had to strain to find a racial component to the comments. Pet. App., p. 25a. The remainder either expressed non-racial concerns or merely asked questions about the project without

expressing an opinion for or against it. Assuming all those who spoke at the meetings also participated in the referendum—and that is by no means certain on this record, which is silent as to who actually signed the referendum petition—this means that those individuals who may have been motivated by racial considerations represented only one thousandth of the referendum petitioners and one ten-thousandth of the City's population.

By contrast, the others who spoke expressed their thoughts on such issues as the project's inconsistent density with the surrounding neighborhood, the impact of the project on the sewer, school system, traffic, storm water drainage, neighboring water wells, property values, and taxes as well as noise and light pollution. Pet. App., p. 47a-48a. These types of concerns are legitimate in the consideration of low-income housing. *Village of Arlington Heights v. Metro. Housing Corp.*, *supra*, at 258; *James v. Valtierra*, *supra*, at 142; *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986); *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995). Indeed, this evidence forced even the court below to conclude that "It is undisputed that the referendum in this case was facially neutral and that there were other hypothetical justifications for the referendum apart from racial bias." Pet. App., pp. 18a-19a.

Despite this dispositive factual finding, the Court of Appeals erroneously inquired into the motivations of the citizens, and then saddled the entire City with the sentiments of the few. However, a few improperly motivated citizens cannot, by themselves, make a referendum. In Cuyahoga Falls, it takes thousands of signatures to perfect a referendum petition. In this case, over 4,300 electors signed the petition. The few

people identified by the court below could effect nothing on their own.

By analogy, in *Scott-Harris v. City of Fall River*, 134 F.3d 427 (1st Cir. 1997), *rev'd on other grounds*, *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), six members of a nine member city council voted to eliminate the position of a city employee. Only two of the six member majority may have been improperly motivated. Because there were other potentially valid justifications for the council's actions, the court refused to impute the improper motives of the two to the remaining four council members. The claim of intentional discrimination against the city itself, therefore, failed.

Likewise, in *Mason v. Village of El Portal*, 240 F.3d 1337 (11th Cir. 2001), the court upheld the firing of a police chief by a 3-2 vote of the village council, finding at page 1339, "there can be no municipal liability unless all three members of the council who voted against reappointing Plaintiff shared the illegal motive."

The rationale for this rule of law was explained in the recent case of *Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002). In that case, the court upheld a county commission's decision to reduce a work force even though one of the three member majority of the commission was improperly motivated. The court explained at 294 F.3d 1298:

> In reaching this conclusion, we draw not only upon our precedent, but also upon our belief that a contrary rule would put lawmakers in an unacceptable position. Lawmakers' support for legislation can come from a variety of sources; one commissioner may support a particular piece of legislation for a blatantly unconstitu-

> tional reason, while another may support the same legislation for perfectly legitimate reasons. A well-intentioned lawmaker who votes for the legislation—even when he votes in the knowledge that others are voting for it for an unconstitutional reason and even when his unconstitutionally motivated colleague influences his vote—does not automatically ratify or endorse the unconstitutional motive. If we adopt the rule suggested by Plaintiff, the well-intentioned lawmaker in this hypothetical would be forced either to vote against his own view of what is best for his county or to subject his county to Section 1983 liability. We think the law compels no such outcome.

This same rationale applies to the popular political process. A person signing a referendum petition with a valid motivation should not be made to fear that others with unsavory motives are also signing the petition. In the instant case, as soon as citizens expressed opposition to the project in even remotely racial terms, all others—government officials and residents alike—were placed on the horns of a dilemma. Any action they took in opposition to the project, no matter how legitimately motivated, would be argued as having given effect to the improper motives of the few. The civil rights laws were never intended to silence the legitimate concerns of the many out of fear of association with the improper concerns of the few. For this reason, the Seventh Circuit held in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1292 (7th Cir. 1977) (*Arlington Heights II*), "the bigoted comments of a few

citizens, even those with power, should not invalidate action which in fact has a legitimate basis."

D. Courts May Not Inquire into the Motives of the Electorate to Find Racial Bias in an Otherwise Facially Neutral Referendum Petition

The Sixth Circuit previously held that courts may not inquire into the motivations of the electorate to find a basis of intentional discrimination. *Arthur v. City of Toledo*, 782 F. 2d 565 (6th Cir. 1986). *Arthur* is nearly identical to the instant case, but was nevertheless eschewed by the court below. In *Arthur*, the people of Toledo pursued a referendum to defeat an ordinance that would have provided sewer service to a low-income housing project. The developer sued raising the same claims raised here by Buckeye. The Court of Appeals, however, refused to consider the motivations of the citizenry, approving the holding of the District Court that, even though "'a few individuals made racial slurs in contacts and meetings leading to the Referendum of 1977, *** [a]bsent any facts to the contrary, the Court cannot infer racial bias to the total electorate.'" 782 F.2d at 574. *Arthur* recognized the impossible situation that would face any city considering a low-income housing project:

> If courts could always inquire into the motivations of voters even when the electorate has an otherwise valid reason for its decision, a municipality could never reject a low-income public housing project because proponents of the project could always introduce race as an issue in the referendum election. *Id.*

Arthur further warned, "Carried to its logical extreme, plaintiffs-appellants could establish a violation of the

equal protection clause if one voter testified that racial considerations motivated the voter's vote ***" 782 F.2d at 574. The court concluded that, "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a District Court cannot inquire into the electorate's motivations in an equal protection context." *Id.*

The court below erred by conducting the very inquiry *Arthur* prohibits. It inquired into the motives of the citizenry even while expressly finding that the referendum petition was facially neutral and supported by considerations other than race. In so holding, the court achieved *Arthur's* "logical extreme" by finding that an equal protection violation could be established if only one voter—or in this case, five residents out of 50,000—expressed racial bias.

The evidence in the record is undisputed. The City Engineer withheld building permits for reasons other than improper discrimination. He sought legal advice from the Law Director and continued to follow that advice for over two years while the courts of Ohio repeatedly affirmed it. The court's holding that the political expressions of five residents can be imputed to 4,300 petitioners and then used to find intentional discrimination on the part of an entire city is erroneous and can only lead to unworkable results. The ramifications of the court's holding are limited only by one's imagination. The decision of the Court of Appeals must be reversed.

III. Disparate Impact – Fair Housing Act

The impact of a facially neutral, judicially upheld referendum petition cannot form the basis of a disparate impact claim under the Fair Housing Act

A. Buckeye's Complaint Failed to Allege a Disparate Impact Cause of Action

One reason for rejecting Buckeye's disparate impact claim—argued below by the City but not accepted by either court—is that its complaint never raised such a claim in the first instance. Buckeye's fair housing claim is found in Count I of the First Amended and Supplemental Complaint at document 115 of the District Court record. Nothing in that count alleges that the referendum had a disparate impact on protected minorities. Rather, the fair housing allegations complain only of intentional discrimination. See *Id.*, at paragraphs 40 and 41. As Buckeye never put forth a disparate impact cause of action, the Court of Appeals erred in permitting it to pursue one. *Yee v. Escondido*, 503 U.S. 519 (1992).

B. The Legislative and Judicial History of the Fair Housing Act do not Support a Disparate Impact Cause of Action in this Case

To date, this Court has not recognized a disparate impact cause of action in the context of the Fair Housing Act, Title VIII of the 1968 Civil Rights Act. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988). The decisions of the circuit courts are not altogether consistent on the matter. See *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989) (requiring a finding of discriminatory intent); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (*Arlington Heights II*)

(recognizing a disparate impact cause of action "at least under some circumstances"). In a later case, the Seventh Circuit refused to extend the disparate impact approach to cases involving racial steering. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521(7th Cir. 1990).

More specific to the facts of this case, the effect of a facially neutral referendum petition cannot form the basis of a disparate impact claim under the Fair Housing Act. In *Arthur v. Toledo, supra*, the court stated at 782 F.2d at 575, "Given the strong policy considerations underlying referendums, we fear that *recognizing a cause of action* in such instances goes far beyond the intent of Congress and could lead courts into untenable results." [emphasis added] Given this Court's abiding respect for referendum rights, *Arthur's* refusal to recognize a disparate impact claim in such a case is understandable. *Meyer v. Grant, supra; Eastlake v. Forest City Enterprises, Inc., supra.*

It is also understandable in light of the plain language and legislative history of the Fair Housing Act. 42 U.S.C. 3604(a) makes it illegal to:

> refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin. states in relevant part. [emphasis added]

As early as 1901, this Court held that, in statutory construction, "the duty of the court 'is to take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, or would

lead to some other inconvenience or absurdity.'" *Treat v. White*, 181 U.S. 264, 267 (1901).

The key words in the statute are "because of." Webster's New World Dictionary, Second College Edition, defines "because" as "for the reason or cause that; on account of the fact that; since" or "the reason that." This language decidedly refers to cause and effect, an action taken "because of" one's status. Such causal language necessarily contemplates a deliberate act taken for an intentional purpose, *caused* by one's protected status under the statute. An otherwise legitimate act that merely has a disparate impact on protected classes cannot be said to have been taken "because of" the status of protected classes. The plain meaning of this language couldn't be clearer.

The City realizes that the above argument was rejected in *Arlington Heights II*. However, the City's position is further supported by legislative history not addressed in that case. During debate on the bill, a discussion occurred between Senators Magnuson and Mondale, who was a prime sponsor of the act. Senator Magnussen asked if the act would prohibit him from arranging privately to sell his home to another white Senator without making the home available on the open market. Such an act would clearly preclude the opportunity for others, including minorities, to purchase the home, thus having a discriminatory effect on minorities. Even so, Senator Mondale assured his colleague that such would not be illegal. 114 Cong. Rec. 4974. Senator Magnuson followed up with the following:

> Mr. Magnuson: The only prohibition is if I sought the Senator out to prevent someone else

from buying it and it discriminated against him. If that happened, that would be a violation of the law?

Mr. Mondale: Yes. The bill simply reaches the point where there is an offering to the public and the prospective seller refuses to sell to someone solely because of race.

Mr. Magnuson: And he would have to prove discrimination.

Mr. Mondale: Yes; and the burden is on the claimaint.

Id. The material difference in the two hypothetical situations posed by Senator Magnuson was that discriminatory intent was absent in the former, but present in the latter. Both, however, achieved the same effect, a sale of the home to an unprotected fellow Senator. Thus, Senators Mondale and Magnuson clearly understood the act to prohibit only intentional discrimination and not the mere impact of an otherwise legitimate act. Senator Mondale further stated at *Id.*, at 5643:

> The bill permits an owner to do everything that he could do anyhow with his property ***, except refuse to sell it to a person *solely* on the basis of his color or his religion. That is all it does. [emphasis added]

Clearly these comments by the bill's sponsor demonstrate at least his understanding of the meaning of the words "because of." From these remarks, it is inconceivable that Senator Mondale ever intended that, some thirty-four years later, a developer could use the Fair Housing Act to invalidate—and hold a

municipality civilly liable for—a facially neutral referendum petition. *Arthur, supra*, 782 F.2d at 575.

C. *The Facts of This Case do not Support a Disparate Impact Claim even under Those Cases that have Recognized Such a Claim*

Even those cases that have recognized a disparate impact cause of action under the Fair Housing Act have done so with severe limitations. For example, in *Arlington Heights II*, *supra*, the seminal case on the matter, the court found that a disparate impact claim could be found, but only "under *some* circumstances." 558 F.2d 1283. [emphasis added] Yet, those circumstances were not necessarily present in that case, even with the court finding that the municipal action had a disparate impact on minorities. The court remanded the matter for further factual determinations.

Likewise, in *Arthur v. Toledo*, *supra*, the court stated at 782 F.2d 577:

> not every denial, especially a temporary denial, of low-income public housing has a discriminatory impact on racial minorities sufficient to establish a prima facie violation of the Fair Housing Act. Accordingly, naked effect of an action by a government subdivision, without more, does not invoke the provisions of the Fair Housing Act. Otherwise municipalities would be forced to approve public housing projects regardless of cost, design, or the other considerations.

In *Arlington Heights II*, the court set forth a four prong test to determine whether a disparate impact claim could be sustained. The four prongs are:

1. The strength of the plaintiff's showing of discriminatory effect,
2. Whether there is some evidence of discriminatory intent,
3. The defendant's interest in taking the action complained of, and
4. Whether the plaintiff is seeking to compel housing or merely to restrain the defendants from interfering with housing.

Arthur recognized all but the second factor above, reasoning that a plaintiff should not receive "half credit" for failing to prove discriminatory intent. 782 F.2d at 575.

However, even applying the remaining three factors, the *Arthur* court refused to recognize a disparate impact claim in the referendum context. Focusing on the third prong of the *Arlington Heights II* test, the court recognized that the interest in upholding referendum rights far outweighs the statutory interests of a developer. *Id.* In fact, disparate impact liability in such a case will all but eliminate the exercise of first amendment rights in the context of low-income housing, producing the very "untenable results" *Arthur* sought to prevent.

IV. Rational Government Action – Substantive Due Process

The act of withholding of a building permit where the lawful prerequisites for its issuance have not been met, and where the withholding is required by the judgments of state courts does not constitute a due process violation

The Due Process Clause of the Fourteenth Amendment has two components, substantive and procedural due process. Both courts below recognized that Buckeye's complaint raised the issue of substantive due process. Pet. App., p. 26a, 33a, 41a.

A. General Substantive Due Process Law

The purpose of substantive due process is to prevent legitimate property rights from being deprived by government action that is arbitrary, capricious, and irrational. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). In a due process claim, the plaintiff must establish a constitutionally protected property interest in the thing denied and that the denial was arbitrary and without a rational basis in law. *Id.; Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997).

Without judicial restraint, it is easy to turn any injury to persons or property by a government official into a due process claim. As this Court cautioned in *Paul v. Davis*, 424 U.S. 693, 698-699 (1976), "It is hard to perceive any logical stopping place to such a line of reasoning." For this reason, the federal judiciary has been justifiably reluctant to extend due process protection to interests that are more properly protected in state courts construing state law. *Parratt v. Taylor*, 451 U.S. 526, 544 (1981); *Chiplin Enterprises v. City of*

Lebanon, 712 F.2d 1524 (1st Cir. 1983); *Contreras v. City of Chicago, supra*. A due process claim requires more than an allegation that "the government decision was arbitrary, capricious, or in violation of state law. *** Otherwise, every violation of state law could be turned into a federal constitutional tort." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992).

Here Buckeye claimed two violations of state law. First, it claimed that the referendum petition violated the Ohio Constitution. Second, it claimed that the City was required to issue building permits notwithstanding the preemptive effect of the referendum. While Buckeye presented these claims in state court, it chose a most time consuming judicial path, one that took over two years to wind its way through Ohio's three levels of courts.

Instead, Buckeye could have filed an original action in the Ohio Supreme Court, bypassing the two lower courts completely. Ohio law permits an original action in mandamus to raise elections challenges and to obtain building permits. See, *e.g.*, *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338 (1997); *Christy v. Summit Cty. Bd. of Elections*, 77 Ohio St.3d 35 (1996); *State ex rel The Killeen Realty Co. v. East Cleveland*, 169 Ohio St. 375. (1959). Thus, Buckeye could have sought a writ of mandamus, which would have provided Buckeye with a very efficient and expeditious remedy in the state's highest court, rather than the two year declaratory judgment process it chose to pursue. Accordingly, Buckeye is without a due process claim in federal court. *Contreras v. City of Chicago, supra*; *Chiplin Enterprises v. City of Lebanon, supra*; *Chesterfield Dev. Corp. v. Chesterfield, supra*.

B. Buckeye did not Hold a Constitutionally Protected Property Interest in Building Permits

Not all rights are protected by the due process clause. Due process protects only those rights that are "fundamental" and "implicit in the concept of ordered liberty." *Palko v Connecticut*, 302 U.S. 319, 325 (1937); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). Such fundamental rights do not include the right to receive building permits, even where state courts have ordered their issuance.

In *Chiplin Enterprises v. City of Lebanon, supra*, the City of Lebanon, New Hampshire, delayed issuing building permits for five years despite the developer's claim that he had complied with all requirements of the permit issuance. Ultimately, the New Hampshire state courts agreed and ordered the permits issued. Despite this, the federal court held that there was no due process property interest in the desired permits. Likewise, in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991) the court held at page 31, "This Court has repeatedly held, however, that rejection of development projects and refusals to issue building permits do not ordinarily implicate substantive due process."

While other cases have been slightly more friendly to developers, not even they help Buckeye's cause. For example, in *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995), the Sixth Circuit held that one can establish a property interest in a permit only if, under the permit approval process, the government agency is without any discretion to deny the permit. Even in *Triomphe*, however, it was not enough that the proposed use "conformed to all of the zoning requirements" or that the permit denial was found to be

arbitrary and capricious by a state court. *Id.*, 49 F.3d 200. Since the *process* granted discretion in considering the permit request—*even though there was no basis for the specific denial at issue*—the plaintiff in *Triomphe* did not have a legitimate entitlement to the requested permit. See also *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992), which reached the same result.

It cannot be seriously argued that the City was without discretion in considering Buckeye's site plan or its application for building permits. Rather, Cuyahoga Falls Ord. 1144.04, Jt. App., p. 22, lists a myriad of factors that the City may consider when reviewing a site plan, consideration of which necessarily requires the exercise of discretion.

As to building permits, the court below erroneously held that the City's approval of Buckeye's site plan gave it a constitutionally protected property interest in the desired permits. However, that holding ignored the totality of the site plan review process which, at the time under Ohio law, included potential popular review by way of referendum. Article IX, Section 2, Cuyahoga Falls Charter; *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). Until the referendum process was concluded, the site plan approval was not final and Buckeye could claim no right to building permits arising from it.

Further, in Cuyahoga Falls, a site plan approval is but one of many lawful prerequisites to the issuance of permits. Buckeye failed to fulfill other conditions, which failure *prevented* the City from issuing the requested permits. Cuyahoga Falls Ordinance 1144.03 prohibits the issuance of permits "except in accordance

with a plan of development*** " Jt. App., p. 21. In this case, the plan of development included several conditions that were "accepted by the Foundation." First Amended and Supplemental Complaint, District Court Document No. 115, paragraph 21. One of the conditions required Buckeye to construct a fence *before* obtaining building permits for the project. Jt. App., p. 25. It did not do so. Without building the fence, Buckeye could claim no entitlement to permits that depended upon the fence's prior construction.

Since the site plan approval did not take effect and since Buckeye did not fulfill the prerequisites to the issuance of building permits, it cannot claim a constitutionally protected property interest in either the site plan approval or building permits.

C. The City's withholding of Permits was not Arbitrary, Capricious or Without a Rational Basis.

A substantive due process violation also requires a finding of arbitrary conduct in the strict sense, that there is no rational basis for it. *Pearson v. Grand Blanc*, *supra*. Arbitrary conduct is that which is "'egregiously unacceptable, outrageous, or conscience-shocking.'" *Licasi v. Ferruzzil*, 22 F.3d 344, 347 (1st Cir. 1994), quoting *Amsden v. Moran*, 904 F.2d 748, 754 (1st. Cir. 1990).

Applying this standard, it would be the height of absurdity to conclude that the City acted arbitrarily. Chronologically, it first approved Buckeye's project; surely that was neither arbitrary nor capricious. When citizens filed a facially valid referendum petition, the City followed its charter and state law and submitted the same to the board of elections, first for verification of the signatures and later for placement on the ballot.

Article IX, Section 2, Cuyahoga Falls Charter; *State ex rel. Bond v. Montgomery, supra.* Surely nothing in that conduct shocks the conscience.

When Buckeye challenged the referendum judicially, and the courts upheld its validity, the City took the only action available to it and continued to honor the preemptive effect of the referendum on its ability to issue permits. This continued until the Ohio Supreme Court reversed itself. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539, (July 16, 1998). After that decision, and after Buckeye constructed the required fence—which took over a year after the final decision—the City issued the permits. In short, the City's actions were taken in reliance upon and obedience to the law. Such simply cannot be held to be arbitrary, capricious, irrational, or conscience-shocking.

As the withholding of building permits was required by a judicially upheld referendum petition and Buckeye's failure to comply with the conditions of site plan approval, there was neither a property interest in the desired permits, nor was the City's withholding of the permits arbitrary or without a rational basis. Furthermore, insofar as Buckeye felt it had a right to building permits, it had more than adequate remedies under state law. Therefore, its due process claim simply cannot be sustained under any reading of federal due process law. To the extent the Court of Appeals held otherwise, its decision is in error and must be reversed.

Conclusion

In the United States, the people have the right—and, indeed, are encouraged—to attend public meetings, to express their political views, and to petition their government. These jealously held rights, however, have little meaning if their exercise can form the basis of civil liability against an entire municipality.

The City's liability—if there can be any—will not be the result of the actions of its officials, all of which were required by law, but rather the result of *statements* made by citizens at public meetings. The City's liability will be based, not on its rightful obedience to court decisions, but because the people filed the petition in the first place. This Court simply cannot permit the exercise of First Amendment rights to result in civil liability.

For the foregoing reasons, the petitioners respectfully request that the judgment of the Court of Appeals be reversed and final judgment entered for the City of Cuyahoga Falls and its officials.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 01-1269

(10)

In The

Supreme Court of the United States

THE CITY OF CUYAHOGA FALLS, *et al.*,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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PARTIES TO THE PROCEEDINGS

PETITIONERS

The Petitioners are the City of Cuyahoga Falls, its Mayor, Don L. Robart, its former City Engineer, Gerald Dzurilla, and its former Clerk of Council, Gregg Wagner. Petitioners were the defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Since this case was filed in 1996, both Gerald Dzurilla and Gregg Wagner have left their positions with the City. The individual defendants remain in this litigation in their official capacities only.

RESPONDENTS

The Respondents are Buckeye Community Hope Foundation, a not-for-profit corporation that seeks to construct housing utilizing housing tax credits; Buckeye Community Three, L.P., a limited partnership that owns and operates the housing development in question; Cuyahoga Housing Partners, Inc., a not-for-profit corporation acting as the general partner of Buckeye Community Three, L.P., (referred to collectively as "Buckeye,"); and, the Fair Housing Contact Service, a not-for-profit fair housing advocacy organization. Respondents were plaintiffs in the District Court and appellant/cross-appellees in the Court of Appeals. Petitioners are unaware of any publicly held companies owning 10% or more of the stock of any of the respondent entities.

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The following individuals made substantial contributions to this brief: P. Gilbertson Barno, Professor Eric Schnapper, Fair Housing Law Clinic staff attorney David G. Oakley, Esq., John Marshall Law School student Keith Levy, and Cleveland-Marshall College of Law students Michela Huth and Edward R. Pekarek

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STATEMENT OF THE CASE

Buckeye is a real estate developer that specializes in developing affordable housing. Transcript of Preliminary Injunction Hearing (hereinafter, "Tr.") 11; Docket Entry Record (hereinafter, "R.") 70, 71, 72. Buckeye relies on housing tax credits to develop affordable housing. It finances its developments with such tax credits, local, federal, and state grants, financing from private financial institutions, and its own development fund. Tr. 12. Buckeye must offer rents at or below a level affordable for people with incomes no greater than 60% of the area's median income (adjusted for family size) to obtain the tax credits. Tr. 13. Buckeye's developments, including the Pleasant Meadows development at issue here, provide housing for people with mid-level incomes, such as teachers, librarians, and police officers. U.S. Supreme Court Joint Appendix (hereinafter, "App.") 142.

The tax credit program is subject to strict deadlines, which make such developments especially vulnerable to delay. Sixth Circuit Joint Appendix (hereinafter, "JA") 302-04. A development must be placed into service, i.e., receive a certificate of occupancy from the local building authority, by the end of the second year following the tax credit award. Tr. 13.

In 1995, Buckeye located a suitable parcel of land on Pleasant Meadows Boulevard in Cuyahoga Falls, Ohio, a city that is 99% Caucasian. This parcel was zoned to allow 17 units per acre. JA 148; Tr. 202-27. The Pleasant Meadows development was planned as a 72-unit complex (approximately 11 units per acre), with 16 two-bedroom, and 56 three-bedroom units. Tr. 29-30. The planned development of the land was well within the maximum

density permitted by the zoning. App. 136. Before purchasing the land, Buckeye's President, Steve Boone, sent a letter to Cuyahoga Falls Mayor Don Robart informing him of Buckeye's intention to buy the Pleasant Meadows parcel. JA 1382. Several days later Robart assured Boone that Buckeye would have "no problem" with the tax credit development. JA 1380-82. In reliance on that assurance, Buckeye then purchased the Pleasant Meadows land for approximately $300,000. Tr. 20-21. Buckeye paid a premium for the land because of the zoning classification allowing up to 17 units per acre. JA 724, 728-30. In addition to the tax credits, Buckeye secured construction financing from National City Bank in the amount of $3,195,000.

City officials knew that delay would be catastrophic for Buckeye. App. 157, 763; JA 943. If the housing tax credit program deadlines are missed, the developer loses the tax credits that are the basis of the development's financing, and the development becomes financially impossible to construct. Tr. 14. In addition, the developer is precluded from competing for grants to support other tax credits developments. Tr. 50-51. Because tax credits for Pleasant Meadows were approved in 1995, it was imperative that the development be ready for occupancy by December of 1997. Tr. 13. Moreover, if Buckeye did not close the National City Bank loan by December 15, 1996, it would lose the construction financing and would have to find alternate financing, which, according to Boone, would have been "pretty much impossible." Tr. 27.

Buckeye encountered extraordinary opposition at every stage of its development of Pleasant Meadows. In the fall of 1995, Buckeye started working with the City's Planning Department to secure approval of the site plan

for the Pleasant Meadows development. Tr. 31. The Planning Department imposed excessive requirements for a development of this kind. Tr. 32, 47. For example, as a condition to proceeding with construction, Buckeye was obligated to build, at an estimated cost of $70,000, an eleven-foot high "barrier" wall or "buffer" between its property and adjoining condominiums. Tr. 47; JA 152-54, 966-67.

A Planning Commission meeting was scheduled for February 21, 1996 to consider approval of the site plan for Pleasant Meadows. Prior to that meeting, both Planning Director Sharpe and Mayor Robart met with neighborhood groups who expressed opposition to the development, based in part on the number of children expected to live there. Tr. 135-37; 271-74. Councilman Potts solicited opposition to the development by sending a notice to ward constituents urging them to attend the February 21 meeting to "express [their] concerns." JA 484-88.

On February 21, the Planning Department submitted Buckeye's site plan to the Planning Commission for approval. App. 35-52. The City's law expressly limits the scope of the inquiry that may be made by the Planning Commission in approving the site plan.[1] However, public officials and residents voiced opposition throughout the meeting, based on issues outside the permissible scope for evaluating a site plan. App. 37-49. Steve Boone described the February 21 meeting as "walking into a hornets' nest." Tr. 34. He was asked to answer questions "that had absolutely nothing to do with the allowable factors for site plan approval," such as, "Are your little kids going to shut up

[1] Cuyahoga Falls Ordinance 1144.04 (July, 22, 1974).

right at sunset?" Tr. 36; App. 44. Because there was no legal basis to reject the development, the Planning Commission reluctantly approved the site plan on February 21, 1996. App. 50; Tr. 150-57.

Site plan approval for a development of this type in Cuyahoga Falls required ratification by the City Council of the Planning Commission's approval. Tr. 128. A Council meeting was scheduled for March 4, 1996. At the meeting Mayor Robart spoke out vehemently against approving the Pleasant Meadows site plan, echoing the "mood of the community." R. 40, Ex. D, p. 50. He suggested delaying the Council vote to buy time. R. 40, Ex. D, p. 150. At this meeting, the City's Law Director first mentioned a referendum, which was then taken up by citizens in April. App. 173-74. The vote to approve the site plan was tabled at Robart's request to March 18. Tr. 40.

At the March 18 meeting, Robart noted that Buckeye had important "deadlines" and urged Council to exploit those deadlines by rejecting the site plan and "go to court." Robart held this view despite advice from the City's Law Department that if the City were sued, it would probably lose. App. 157, 119. Councilman Rubino told the gathered citizens how he had looked for any possible legal reason to oppose the site plan and that he could find none. He and Councilwoman White admitted to "trudging around in about seven inches of mud" in a vain effort to find wetlands as a "legal shred" to halt development. App. 150. City Council's vote was again delayed to get a written opinion from the Law Department as to whether there was any legal basis for the City to reject the development. Tr. 43. On March 29, 1996, the Law Department responded that the City must base its decision solely upon the zoning code. R. 40, Ex. G.

After the March 18 meeting, Boone was approached by Councilman Schmidt with a request that Buckeye change the location of the development away from the Pleasant Meadows location. Tr. 45. Boone met with three members of City Council as well as a planning official to view the proposed alternate site which was located on an active landfill. Because tax credits are awarded on a site-specific basis, Buckeye was unable to move the site of the development. Tr. 45-46.

Council eventually approved the site plan on April 1, 1996. Tr. 43; JA 935. Buckeye immediately applied for building permits. Tr. 95. When the ordinance to approve the site plan was presented to the Building Department, however, the Mayor directed Service Director Barbara Sculley not to issue Buckeye any permits until further notice. R. 34, Ex. A. City Engineer Dzurilla, who was also Chief Building Official and Planning Examiner, stopped work upon receipt of a Law Department memorandum instructing him to hold any permits "in abeyance." R. 34, Ex. A. Several days later Dzurilla received an unprecedented order from Sculley that he was not to issue building permits for the Pleasant Meadows development without her approval. Tr. 193-94.

Citizens began organizing a referendum drive after several meetings with the Mayor and Planning Director. Tr. 271-79. Mayor Robart had input regarding the name of the petition campaign, and spoke out in favor of the drive at a citizens' meeting on April 9. R. 40, Ex. D, pp. 84-88; JA 903, 1174. While various comments were made at this meeting about the children who would live in Pleasant Meadows, those who would circulate the petitions were warned not to make any discriminatory comments. Tr. 295.

A referendum petition was filed with the Clerk of Council, Gregg Wagner, on April 29, 1996. Tr. 196. It was then sent to the Summit County Board of Elections for signature validation. On or about May 1, 1996, the petition was returned to the City from the Board of Elections indicating that the signatures were valid. R. 68. The City accepted the filing despite a Law Department memorandum explaining that the City's site plan review was limited to those matters within the zoning code. JA 816-17. A vote on the referendum was held in November, 1996, but the vote was not certified pursuant to a ruling by District Court Judge Bell. R. 68.

P. Gilbertson Barno, Executive Director of Buckeye, wrote a letter to the Engineering Department on June 20, 1996, demanding that the building permits for Pleasant Meadows issue. App. 110. On June 26, Dzurilla, on advice of the Law Department, sent a letter to Buckeye informing them that the building permits would not issue due to the referendum. JA 907.

Buckeye did not receive building permits until approximately three years after its initial application. As a consequence of this delay, Buckeye was shut out of tax credit developments for a period of approximately three years because the failure to meet time deadlines precludes a developer from applying for grants to support other tax credit funding. Tr. 50-51; R. 193-94. Because Buckeye named the funding entities that controlled the financing of Pleasant Meadows as nominal defendants in this lawsuit and was able to reach a settlement whereby they changed Ohio's tax credit allocation plan, Pleasant Meadows was constructed in 2000 at substantially increased cost, despite the city's efforts to kill it. However, as a result of the years of delay, Buckeye's ability to construct other housing

was severely impaired and Buckeye and its principals were brought to the brink of bankruptcy. JA 1220-24, 1269. Estimates of damages were produced to the City and in court in 1999 and were in the millions. R. 193-94.

Respondent Fair Housing Contact Service introduced uncontroverted statistical evidence that if Buckeye's development were not built, families with children and African-Americans would be disproportionately harmed. Tr. 202-27.

PROCEDURAL HISTORY

Following the filing of the referendum petition, this case proceeded on two tracks: a declaratory judgment action originally filed in the Summit County Court of Common Pleas and a separate federal action for damages and injunctive relief filed in the United States District Court for the Northern District of Ohio. On May 1, 1996, Buckeye filed a declaratory judgment action to have the referendum that sought to reverse Buckeye's site plan approval declared unconstitutional under Ohio law. The Ohio Court of Common Pleas denied declaratory relief and the Ohio Court of Appeals affirmed. The Ohio Supreme Court also affirmed, but reconsidered its decision and ultimately declared the referendum unlawful under the Ohio constitution on July 16, 1998. JA 56-58.

Buckeye filed the federal action on July 5, 1996, seeking injunctive relief and damages under both the Fair Housing Act and the Fourteenth Amendment. Buckeye sought a preliminary injunction to stop the referendum from rescinding their site plan approval, and a preliminary injunction hearing was held before District Court Judge Sam Bell on November 19-21, 1996. The City filed a motion for summary judgment on October 15, 1996. Judge

Bell denied the preliminary injunction on December 13, 1996, and Judge Bell also denied the City's motion for summary judgment on June 20, 1997 in a comprehensive published decision.[2] The case was set for trial in August 1998. Buckeye moved for partial summary judgment as to liability with respect to the due process claim on April 2, 1998. The City moved for summary judgment on all claims on June 5, 1998. Prior to ruling on the motions and prior to trial, Judge Bell retired. District Court Judge Dan Polster was assigned the case on September 8, 1998. Judge Polster granted the City's summary judgment motion and denied Buckeye's motion on November 19, 1999. Petition for Writ of Certiorari p. 35a.

Buckeye appealed to the United States Court of Appeals for the Sixth Circuit, which reversed Judge Polster's decision on August 31, 2001.[3] The City filed for reconsideration *en banc* and was denied. The City then filed a Petition for a Writ of Certiorari on February 26, 2002, which was granted on June 24, 2002.

SUMMARY OF ARGUMENT

[1] There is ample evidence to permit a reasonable jury to find intentional discrimination on the basis of race and familial status. This case is not about a single decision of the City Engineer. Instead, it is about a concerted and protracted scheme by City officials and residents to block

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[2] *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F. Supp. 1289 (N.D. Ohio 1997).

[3] *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001).

Buckeye's development, using excessive site plan requirements, delay, environmental excuses, Law Department strategies, and finally a referendum, in their campaign to kill Pleasant Meadows.

The record is replete with direct evidence that discrimination was the motivating force behind that campaign of resistance. Intent is also proven by circumstantial evidence, as persons are presumed to intend the natural and foreseeable consequences of their actions. There is sufficient circumstantial evidence to merit a trial. Examples include an open search for pretext, the impact of the challenged action on protected classes, the historical context of the actions, the sequence of events leading up to the challenged action, departures from normal practice in procedure and substance, and the administrative history.

[2] The First Amendment does not prohibit the introduction of evidence to prove intent, even if that evidence is speech or political activity. No referendum organizer or voter was sued, and thus there was no chilling effect on any political activity. The First Amendment does not create a right for any person to discriminate in violation of the Equal Protection Clause or the Fair Housing Act.

The City insists that a referendum proposed and approved for invidious racial or family status reasons is nonetheless valid under the Fourteenth Amendment as long as the referendum is facially neutral. If that were correct, it would legitimize a referendum rejecting construction of a synagogue or mosque, even where proponents openly campaigned on the basis of anti-Semitic or anti-Muslim rhetoric.

[3] The Due Process Clause plays a fundamental role in the land use context and protects landowners from arbitrary and capricious actions by governmental entities

which interfere with their legitimate expectations. Buckeye possessed a property interest based both upon its ownership of the land and the full compliance of its site plan.

Buckeye's property interest was infringed upon when the City permitted a purely administrative question to be submitted to a referendum vote. A governmental entity violates substantive due process when it delegates administrative decisions to voters. Voters decided whether one specific landowner, Buckeye, could be denied uniform application of the law, although the law would remain unchanged for all others.

The referendum at issue placed on the ballot the purely factual and administrative question of whether a site plan the voters had never seen complied with a zoning code they had never read. The Planning Commission and City Council had already determined that the site plan unquestionably complied. Accordingly, no rational basis exists for the question presented on the ballot.

The Charter's referendum provision did not provide for citizens to waive restrictions to permit development. Instead, the site plan referendum permitted voters to decide in a standard-less, and hence, arbitrary and capricious manner, which violates substantive due process.

Finally, the evidence raises factual issues that the challenged decision was due at least in part to an improper or illegal motive. The facts presented raise a valid claim that the decision did not bear a substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power.

ARGUMENT

I. THERE IS SUFFICIENT EVIDENCE TO PERMIT A TRIER OF FACT TO FIND THE EXISTENCE OF A DISCRIMINATORY MOTIVE

This case is not about a single decision by the City Engineer, but rather a concerted campaign on the part of City officials and private citizens that continued over a number of months to stop Pleasant Meadows, motivated by race and familial status discrimination. It is undisputed that Pleasant Meadows would house a substantial number of African-American residents in a 99% white city. Between the fall of 1995 and November of 1996, City officials, in concert with a group of like-minded private citizens, searched for ways to stop the development because the anticipated residents would be non-white families with large numbers of children. The participants used a variety of tactics, culminating in a referendum, a tactic ultimately held to be impermissible under state law.[4] The question before this Court is whether this pattern of behavior would support a judgment that it violated the Fourteenth Amendment or the Fair Housing Act because it was motivated by the race and/or familial status of the prospective residents of Pleasant Meadows.[5]

The District Court erroneously granted summary judgment. The City agrees that it is liable if it were the "moving force" behind the alleged discrimination.[6] There is ample evidence that City officials indeed acted in concert

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[4] *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St. 3d 539 (1998).

[5] 42 U.S.C. §§ 3602(k) and 3604.

[6] *Petitioners' Brief on the Merits*, p. 11.

with private individuals to intentionally discriminate against Buckeye and attempted to halt the multi-family development because of the race and familial status of the persons who were expected to reside there.

This Court's decisions from *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*[7] to *Reeves v. Sanderson Plumbing* establish the framework for finding intentional discrimination.[8] The *Arlington Heights* test requires only that a discriminatory purpose was a "motivating factor" for the action taken.[9] Unlike *Arlington Heights* where the District Court and the Court of Appeals upheld a decision after a trial using the clear error standard of Fed. R. Civ. P. 52, the issue here is whether Buckeye has presented enough evidence to merit such a trial.[10]

A. CITY OFFICIALS ACTED IN CONCERT WITH PRIVATE CITIZENS TO USE A VARIETY OF TACTICS TO STOP THE DEVELOPMENT

The Pleasant Meadows development was first proposed to City officials in June of 1995. Over the next eleven months City officials, in concert with residents, created a series of impediments to block Buckeye's development. These obstacles included: imposing stringent site plan requirements; delaying routine votes; searching to

[7] *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

[8] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[9] *Arlington Heights* at 265-66.

[10] Fed. R. Civ. P. 56.

see if the land could be classified as a "wetland;" and culminating in an illegal referendum. These facts are stronger than those presented in *Arlington Heights*, which was decided after the facts were developed in a bench trial. In contrast, this case was decided on a motion for summary judgment where all inferences should have been drawn in favor of Buckeye.[11]

The first roadblock was erected by the Planning Department, which demanded the building of a $70,000 eleven-foot impenetrable wall to ghettoize and segregate Pleasant Meadows residents from the surrounding community. The barrier wall was to be at least five feet of bulldozed soil, topped with a six-foot "brick pilaster/cedar batten board fence [to] run the full length of the property." Tr. 47; App. 30-31. The Planning Department required that the barrier be completed before building permits could issue and before any other construction on the development could begin. App. 30. Councilwoman Kathy Hummel could not "recall any project where there [had been such] scrutiny on a site plan, and ha[d] never seen a requirement for a developer to put up a fence *prior* to . . . construction." App. 49 [*emphasis added*]. This substantive departure from normal practice is strong evidence of discrimination.[12]

The requirement that a barrier be built between Pleasant Meadows and the condominiums next door was unique and sent an ominous signal that the City considered this development to be different and separate from

[11] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), *and see*, Fed. R. Civ. P. 56.

[12] *Arlington Heights* at 267.

any other. The barrier would be a constant visual reminder that the residents of Pleasant Meadows were different from the residents of the adjoining condominiums. Buckeye acquiesced in the Planning Department's insistence on this $70,000 barrier wall[13] as well as to other unusual requests, such as changing the name of the development,[14] not because they were required by the City's zoning code, but because of assurances received from the City's Planning Department that such concessions would smooth the approval process. Tr. 47, 131.

Delay was the next strategy. After the Planning Commission approved the site plan upon Buckeye's acquiescence to its excessive demands, Mayor Robart urged delay at the March 4, 1996 City Council meeting in front of a number of residents (who later became referendum leaders), stating that he would oppose Pleasant Meadows "with vigor." JA 921-22. Knowing that delay would derail the time sensitive tax credit financing, Robart urged the Council to adjourn its vote on the site plan for "two weeks, a month [or longer,]" "to stall the vote [which] would have bought some time." JA 967; R. 40, Ex. D, p. 50. Following the Mayor's lead, Council tabled the

[13] The wall was not immediately constructed because, in the face of the referendum campaign, Buckeye considered construction of the estimated $70,000 barrier to be a futile gesture, at least until after the referendum was decided. Tr. 48, 92. As this Court has noted, "litigants are not required to make futile gestures." *See, Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 *n.*3 (1992).

[14] The City further requested that the original name of the development – Cuyahoga Terrace – be changed because it sounded like a public housing project. Tr. 129-30. Pleasant Meadows was not a Section 8 project, nor was it public housing, but rather is a development for tenants earning 60% of the median income in the area.

hearing until March 18. App. 198. At the subsequent March 18 meeting, despite Boone's request not to further delay Buckeye's efforts to develop Pleasant Meadows, the vote was again postponed to April 1. JA 935, 953.

After City Council's ratification of the site plan approval at its April 1 meeting, Robart pressed for further delay by asking Service Director Sculley to instruct City officials to not issue any building permits to Buckeye "until further notice." R. 34, Exhibit A. Sculley complied and sent City Engineer Dzurilla a May 1, 1996 memorandum. The directive was copied to the Mayor as his immediate supervisor, and it ordered that no building permits were to issue for Pleasant Meadows without Sculley's prior approval. Dzurilla had never seen a memorandum of this nature for any other development. Tr. 193-94.[15]

On April 30, prior to the referendum certification, the Law Department further entangled itself by directing City Engineer Dzurilla to hold "in abeyance" any work permits until a determination was made regarding the efficacy of the ordinance approving the site plan. R. 34, Exhibit A. Such official interference in the permit process was unprecedented in Cuyahoga Falls. Tr. 191-94.

Furthering the delay, the City welcomed protracted and expensive litigation, even though the City's legal position was of questionable merit. Robart believed that the City would be sued if the site plan was rejected, and

[15] Buckeye received an April 26 letter from the Building Department requesting changes, many of which were not required under the zoning code. Tr. 94-96. Buckeye responded in writing to the requested changes on May 14, 1996, in part noting that the City had misquoted its own zoning code. *Id.* at 96.

that City officials could be sued in their individual capacities. Nevertheless, he urged Council to reject the site plan, and "go to court . . . let's see what happens," despite his conclusion that, "we are probably going to lose." App. 157; App. 119.[16] Robart noted that the City has an "in-house law department" that "get[s] paid whether they are defending [a lawsuit by Buckeye] or if they are defending another case." App. 156; JA 923. Robart "doubt[ed] Mr. Boone has an on staff law department to file a lawsuit," and noted that Boone "has to spend dollars, then he has got to make a decision as to how long does he want to pursue this thing, given the fact that we all know that somewhere along the line there is a deadline." App. 157. Robart knew at the time he made these statements that Pleasant Meadows was scheduled to be built in a properly zoned area, and that the Planning Commission had approved the site plan. Tr. 322.

Third, City officials attempted to contrive an environmental excuse to stop Pleasant Meadows. At the March 18 meeting, Councilwoman White explained that she joined Councilman Rubino and City Clerk Wagner in "trudging around in about seven inches of mud" to try and establish the Pleasant Meadows' site as a wetland, "[j]ust to get any legal shred that we could hang onto so that we could reject this project." App. 150. Planning Director Sharpe also was present, because Wagner had contacted him about the wetlands stratagem. Tr. 140-42.

Fourth, the City Council asked the Law Department for legal advice about how to stop Pleasant Meadows.

[16] Robart based this assessment on advice he received from the Law Department. App. 119-20; Tr. 314.

Councilwoman Barbara White asked the City's Law Department to issue a written opinion addressing: (1) how to stop the Buckeye development and avoid municipal or personal liability; (2) the extent of individual and Council exposure to civil liability if they rejected the site plan; and (3) whether a referendum could be used to challenge the Council's own pending approval of the site plan. JA 974-75. The Law Department opinion was clear – the only criterion the City could lawfully apply in reviewing the site plan was whether the plan complied with the zoning code; it declined to address the referendum question because the Law Department did not represent individuals. JA 816-17.

Fifth, City officials worked with private citizens to fashion the referendum strategy to prevent construction of Pleasant Meadows.[17] Law Director Kennedy involved the City in halting the proposed development when he planted the seed for a referendum at the March 4 council meeting. App. 173-74. Throughout the site plan approval process, Mayor Robart worked behind the scenes to instigate a referendum to stop Pleasant Meadows. Prior to Council's approval, Robart met privately with residents to organize the referendum drive.[18] Tr. 271-81; R. 40, Ex. G, pp. 84-85; JA 903, 1174. Following Council approval, the Mayor publicly supported the referendum to defeat the Pleasant

[17] The City argued that it cannot be held responsible for the acts of private citizens. Respondents contend that the campaign to stop Pleasant Meadows was a public-private partnership, for which the City is directly liable. *See, e.g., Burton v. City of Wilmington Parking Authority*, 365 U.S. 715 (1961). Furthermore, any actions taken under color of a City's charter are actions of the City, whether taken by elected or appointed officials or by its citizens through referendum.

[18] Robart admitted he had input into the name selected for the opposition group fighting the development. R. 40, Ex. D, p. 85; JA 1174.

Meadows development at an April 9 meeting at North Hampton Town Hall.[19] Tr. 279; R. 40, Ex. G, p. 50.

The next day, April 10, 1996, the Mayor involved the Law Department in the referendum effort despite its earlier memorandum disclaiming City residents as clients. JA 816-17. Robart sought guidance regarding the number of signatures required for a referendum. JA 979. Then, the Mayor warned Steve Boone, "*We* are going to go for a referendum." Tr. 92 [*emphasis added*]. The referendum petition was filed with the Clerk of Council on April 29. Tr. 196.

Dzurilla continued to circulate Buckeye's plans to other departments for comment as late as May 14, 1996. Tr. 192. Dzurilla did not disclose to Buckeye any problems with the site plan. Tr. 190-93. The failure to communicate with a permit applicant [Buckeye] was a deviation from the "normal process." JA 1049-51.

Louis Sharpe, City Planning Director since 1976, is unaware of any other housing development built in Cuyahoga Falls for which a referendum was used to challenge site plan approval. Tr. 139. Sharpe conceded that the Pleasant Meadows site plan met all of the necessary requirements of the zoning code. JA 721. Nonetheless, Sharpe noted on Buckeye's building application that the ordinance would not go into effect until May 1, 1996, curiously adding, "unless otherwise changed by legal action or referendum." Tr. 144.

[19] Councilman George Potts testified that he believed Robart made arrangements for the group to meet at the North Hampton Town Hall, a City-owned building. R. 40, Ex. H, p. 53.

The referendum was simply the final component to the delay strategy when all other ways to stop Buckeye effects had waned. A trier of fact could reasonably find, based on this evidence, that a partnership of public officials and private citizens campaigned to block the Pleasant Meadows development.[20]

B. THE RECORD IS REPLETE WITH EVIDENCE OF DISCRIMINATORY INTENT

The record contains substantial evidence from which a jury could conclude that the City acted "because of" and not merely "in spite of" the impact on racial minorities and families with children.[21] Buckeye contends that the City's animus toward protected groups was the motivating force behind its campaign to stop Pleasant Meadows. When public officials could not circumvent Ohio law mandating issuance of building permits, they orchestrated a public response in an effort to evade the requirements of the Fair Housing Act.

Unlike many cases where intent is hidden, here there are direct statements by public officials and referendum leaders about their motives.[22] Steve Boone attended all

[20] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (petitioner could make out claim for violation of Equal Protection if she proved respondent refused her service at the suggestion of police officer in the restaurant).

[21] *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 281 (1979).

[22] *Compare, Arlington Heights* at 268 *and, Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (delegates "were not secretive about their purpose" and the "zeal for white supremacy ran rampant"); *and see, Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982) (statements of referendum proponents showed racial motives).

three public meetings concerning the site plan and was subjected to angry threats, intimidation and racist opposition. Tr. 36-39. One resident suggested throwing Mr. Boone out a window; others followed him to his car. Tr. 37. The vehemence of the public opposition is by itself strong evidence that the emotional issue of race was present. These meetings were crowded with residents who expressed angry opposition to the Pleasant Meadows development because of the likelihood of its occupancy by families with children and African-Americans. Tr. 34-44. One resident stated, "We have got our ghetto. We have got our low-income housing. This project is already being called Pleasant Ghetto." App. 139. Another resident objected, "when they get that boom box going it will be loud." App. 144.

Residents mirrored the opposition expressed by public officials. Lee Minier, a leader of the referendum drive, stated that, "They know what kind of element is going to move in there [referring to Buckeye's development], just like you have on Prange Drive," the only place in Cuyahoga Falls that has a substantial number of African-American residents. Tr. 182-85, 270, 316.

At a recorded City Council meeting on March 4, 1996, Mayor Robart commented about an article in the local paper titled, "Stuck in the Ghetto," and "problems associated with [subsidized housing]." App. 189. He agreed with State Representative Wayne Jones' statement, "The problem is condensing *these individuals* in one place like Prange Drive. It just breeds problems. I think it is a legitimate concern." JA 917-20 [*emphasis added*]. He further inflamed passions by raising the specter of forced busing. JA 965-66. The Mayor spoke of "problems [associated with] subsidized housing." JA 965-66. Robart stated,

"we have done our part off of Graham road in Cuyahoga Falls," which Robart admitted was meant as a reference to Prange Drive. Tr. 315.

Families with children were openly disparaged. For example, Planning Director Sharpe said, "the sensitive nature of the fact that this project would be a larger family type project" was the basis for the Building Department's insistence upon the eleven-foot high barrier. App. 98. Councilman Potts objected to the approval of the site plan because of the different lifestyles of an adjoining "retirement" condominium and the proposed Pleasant Meadows development "that would potentially have a lot of children." JA 479; App. 37. Mayor Robart expressed sympathy with residents' objections to the expected influx of large families with children. Tr. 274.

Council members openly searched for a pretextual reason to block Pleasant Meadows. Sandy Rubino, Councilman at large for the City, made the following speech at the March 18 Council meeting:

> I am going to be very honest with you folks . . . I have been wrestling with this issue for two weeks and I have not gotten a lot of sleep . . . I have looked under every rock in [*sic*] your behalf, and other members of council have too . . . I spent the better part of a week exploring whether we have wetlands . . . Turns out that it is not true . . . Because I am an attorney, I have looked at the legal issues too. I cannot hide as an officer of the court and a lawyer from what I believe the truth is . . . This project is before us on one simple issue, a site plan review. A site plan review allows us to look at whether that project is within the zoning that is already been enacted into law in the City of Cuyahoga Falls . . . we are not allowed to know if there is going to be 100

kids there, 50 kids there, it is not pertinent to the issue of whether that particular construction project meets our zoning requirements. Our zoning requirements have nothing to do with whether people drink, whether people smoke, whether people shoot guns, whether people do anything. We only have one thing to look at . . . I would hate like Hell to have to look you all in the eyes and vote yes for this project. But, unless I hear something to the contrary from the law department, I do not have any choice. I am being honest with you and it breaks my heart, because you are good people and you deserve consideration . . . This has nothing to do with whether the project is proper. This has to do with whether these folks have the proper R-17 zoning. App. 144-47.

Councilwoman White explained that her motive in trying to define Pleasant Meadows as a wetland was, "[j]ust to get any legal shred that we could hang onto so that we could reject this project." App. 150. The search for such a pretext is by itself compelling evidence that the underlying motive was improper.[23]

In addition to searching for pretext, there were blatant attempts to conceal discriminatory motives. Residents who participated in the April 9 meeting at North Hampton Town Hall were warned not to disclose their lurking biases. When some residents expressed concern about the children who might live in Pleasant Meadows, they were cautioned to avoid making discriminatory remarks. Tr. 293-95.

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[23] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

Along with this wealth of direct evidence of discrimination, there is also significant circumstantial evidence of discriminatory motives. The Pleasant Meadows development was proposed in an historically all-white City. Census data showed that Cuyahoga Falls was only 1.06% African-American. Tr. 202-27. The City had a widespread reputation in the region as a white enclave, as evidenced by its nickname, "Caucasian Falls." Tr. 281, 317. There is no sizable minority population in the City as a whole. What scant minority population the City does have is largely segregated from the white community. In stark contrast to the almost non-existent African-American population in the City, the population of Summit County, where Cuyahoga Falls is located, had a minority population of 11.8%. Tr. 224. The only sizeable concentration of minorities in Cuyahoga Falls was the Honey Locust Apartments on Prange Drive which was referred to with hostility throughout the proceedings. Tr. 182-85, 270, 316; App. 139, 191; JA 918-20.

Under the first *Arlington Heights* factor, "[t]he impact of the official action whether it 'bears more heavily on one race than another,'" cannot be disputed.[24] The Pleasant Meadows development proposed by Buckeye was located next to a condominium development. The condominiums, like the rest of Cuyahoga Falls, were virtually all white. Described as a "retirement community," there were presumably very few, if any, families with children residing in that development. JA 479. Unlike the rest of the City and the neighboring condominiums, the development proposed by Buckeye was forecasted to have a substantial minority

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[24] *Arlington Heights* at 266, quoting, *Washington v. Davis*, 426 U.S. 229, 242 (1976).

population. Furthermore, all of the apartments were designed as two and three bedroom units that would be attractive to families with children. Tr. 30, 172-73. Uncontroverted expert testimony presented by Dr. Mark Salling, Director of Northern Ohio Data and Information Service (NODIS), established the extreme impact on the African-American community and on families with children if the development were not built. Tr. 202-27; App. 271-90.

While Pleasant Meadows had 11 plus units per acre, a few years earlier a 92-unit condominium development with 15 plus units per acre was proposed for the same site as the Buckeye development and approved by the City without opposition. App. 43, 137; JA 148. The earlier condominium project was not built only because the developer went bankrupt. App. 43. Robart openly admitted that "density [was] not the issue." JA 920.

A trier of fact could also conclude that City officials were motivated by discriminatory purposes in treating the referendum petition as valid. The Ohio Supreme Court ultimately held the referendum, and thus the petition, invalid. JA 58. This was an issue about which reasonable attorneys might disagree, but a trier of fact could conclude that the actions of the City officials were actually prompted, not by a good faith legal error, but by discrimination. The City argues that the City Engineer had no racial motive. Even if the Engineer did not possess an improper motive, the campaign to stop the development made him a mere "cat's paw" of the blatantly biased officials.[25]

The referendum filing was accepted despite the City's knowledge that the effects of the referendum would fall on

[25] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

groups protected under the Fair Housing Act. The filing was accepted despite the fact that the City had discretion under Ohio law to reject the referendum petition as inappropriate.[26] A fact-finder could reasonably conclude that, within the totality of the circumstances, the actions taken by the City constituted purposeful discrimination.

There is no question that the actions taken by the City delayed the building of the Pleasant Meadows development and had a severe impact on racial minorities and on families with children. Construction was delayed for about three years as a result of the maneuvering of the Mayor and City officials in concert with private citizens. These efforts to stop construction were thwarted only when the Ohio Supreme Court held that the use of the referendum process in this situation was unconstitutional under Ohio law. The openly stated motives of the residents and City officials in taking the actions are sufficient for a trier of fact to find intentional discrimination against families with children and African-Americans.

The record is riddled with officials' candid admissions that they conjured a pretextual subterfuge in concert with residents to deny Buckeye the site plan approval it had every reasonable expectation to obtain. The *St. Mary's Honor Center v. Hicks* Court established that where:

> [T]he factfinder disbelie[ves] the reasons put forward by the defendant, together with the elements of the *prima facie* case, [that alone] may

[26] *State ex rel. Rhodes v. Bd. of Elections*, 12 Ohio St. 2d 4 (1967) (upholding refusal to put improper initiative petition on ballot); *State ex rel. Barberis v. Bay Village*, 281 N.E.2d 209 (1971) (upheld a City Council's refusal to certify a resolution for a referendum election on an administrative action). *And see*, JA 1041-44.

> suffice to show intentional discrimination, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive.[27]

This case does not involve a spontaneous citizen-sponsored referendum where the City was a mere bystander: the referendum was the end product of a posse, led by Mayor Robart. These actions go far beyond the few comments made by residents against the *Arlington Heights* development. They show a consistent and concerted effort by the Mayor, City officials, and residents, guided by advice from the Law Director, to stop Pleasant Meadows because of the race and familial status of its potential residents.

C. THE FIRST AMENDMENT DOES NOT PRECLUDE EXAMINATION OF EVIDENCE OF INTENTIONAL DISCRIMINATION

A city is not cloaked with immunity from liability for violations of federal constitutional and statutory rights merely because the violations are accomplished by way of

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[27] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134 (2000), quoting, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *See e.g., Wright v. West*, 505 U.S. 277, 296 (1992). "Moreover, once the employer's justification has been eliminated, *discrimination may well be the most likely alternative explanation*, especially since the employer is in the best position to put forth the actual reason for its decision." *Id.* [*emphasis added*].

a referendum. The City of Cuyahoga Falls could not discriminate on the basis of race or familial status by way of legislative or administrative decision-making without being held accountable. That it did so by referendum does not change the result. Given the overwhelming evidence of City officials' discriminatory motives, this Court need not reach any First Amendment issues.

1. VOTERS' RIGHTS WERE NOT CHILLED BY A LAWSUIT AGAINST CITY OFFICIALS WHO VIOLATED EQUAL PROTECTION AND THE FAIR HOUSING ACT

This is not a lawsuit against citizens for exercising First Amendment rights.[28] This Court has uniformly held that in considering whether official action is discriminatory, courts may evaluate statements made by members of the public and statements of public officials or candidates for office.[29]

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[28] This case is thus distinguishable from *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), where the Court of Appeals held that the First Amendment rights of community residents were chilled because of a prolonged and invasive investigation conducted by HUD against the residents for circulating a petition, organizing opposition to, and filing a lawsuit against, a group home that was to be constructed in their neighborhood. The action there was directly against the citizens.

[29] *White v. Register*, 412 U.S. 755, 767 (1973) (use of racial campaign tactics to defeat candidates supported by black voters); *Arlington Heights* at 269 (statements of opponents of the development who spoke at public meetings); *Seattle Sch. Dist. No. 1* at 471 (statements made by proponents of the amendment); *Hunter* at 229 (statements made by delegates); *Thornberg v. Gingles*, 478 U.S. 30, 40, 45, 80 (1986) (appeals to racial prejudice by white candidates relevant in proving claim under the Voting Rights Act).

The argument was made in *Wisconsin v. Mitchell* that a hate crime statute was unconstitutional because to prove the crime, "the state would often have to introduce evidence of the defendant's prior speech, such as racial epithets he may have uttered before the commission of the offense. This evidentiary use of protected speech . . . would have a 'chilling effect' on those who feared the possibility of prosecution for offenses subject to penalty enhancement."[30] This Court rejected the argument as too speculative and held:

> The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or *to prove motive or intent*.[31]

There is no special evidentiary protection for the statements of legislators or voters in this case, nor is there a chilling effect on speech, because this lawsuit did not name the residents whose free speech rights are claimed to have been chilled. The Solicitor General misapplied *Eastern R.R. Presidents Conference v. Noerr Motor Freight,*

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[30] *Wisconsin v. Mitchell*, 508 U.S. 476, 482 (1993).

[31] *Id.* [*emphasis added*]. In support of its holding, this Court relied on *Haupt v. United States*, 330 U.S. 631, 642 (1947) (holding that in a trial for treason, the government could introduce evidence of conversations consisting of statements showing the defendant's sympathy with Germany and Hitler and hostility toward the United States); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (plurality opinion) (allowing evidence of defendant's statements to evaluate his intent in violating Title VII); *Street v. New York*, 394 U.S. 576, 594 (1969) ("[N]othing in this opinion [which reversed a conviction for flag burning because the defendant may have been punished for his speech] would render the conviction impermissible merely because an element of the crime was proved by the defendant's words rather than in some other way.").

Inc.; *United Mine Workers of America v. Pennington*; and, *BE & K Construction Co. v. N.L.R.B.* when arguing that this Court should require plaintiffs to show that the referendum effort was a "sham."[32] The sham standard has never been required in a case like this. The fact that the defendants resorted to a referendum to defeat plaintiffs' Equal Protection and Fair Housing rights does not give their illegal actions First Amendment immunity.[33]

The City, Mayor Robart, and the City Council cannot claim a First Amendment right to commit discriminatory acts in their official capacities that violate Equal Protection and the Fair Housing Act. Referenda that are used to violate individual rights are illegal without additional

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[32] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965); *and, BE & K Constr. Co. v. N.L.R.B.*, ___ U.S. ___, 122 S. Ct. 2390, 2395-96 (2002).

[33] Because filing a lawsuit is a form of petitioning the government protected under the First Amendment, this Court has held that the lawsuit "must be a sham both objectively and subjectively" in order to be deprived of First Amendment protection, *BE & K* at 2396 (action filed under the National Labor Relations Act). The sham standard developed in *Noerr* and *Pennington* involved direct claims against individuals who filed lawsuits or who engaged in political activity. This case does not seek liability for any referendum organizer or participant. Railroad companies in *Noerr* were sued under the Clayton Act for taking actions protected by the First Amendment to persuade the legislature to pass laws that would destroy truckers as competitors for long-distance freight business. To permit the lawsuit would have directly penalized the railroads for exercising their First Amendment rights. Similarly, in *Pennington* it was alleged that a union tried to influence the Secretary of Labor to set minimum wage laws to drive small operators out of business. Again, this was a direct action under the antitrust laws against a union for exercising its First Amendment rights.

proof that they were a "sham."[34] Indeed, in every land situation, some "rational reason," *i.e.*, density, could always be articulated to defeat a finding that the referendum was a "sham." Whether a governmental action is accomplished by regular legislative process or by referendum is immaterial if it violates rights protected under the Constitution and laws of the United States.[35]

2. A REFERENDUM CANNOT BE USED TO CARRY OUT ILLEGAL DISCRIMINATION

Referenda that violate the United States Constitution are illegal. In *Hunter v. Erickson*, this Court invalidated under Equal Protection an ordinance adopted by the voters in Akron, Ohio.[36] The law provided that any ordinance regulating the use, sale, advertisement, transfer, listing, lease, or financing of real property on the basis of race, color, religion, national origin, or ancestry must first be approved by a majority of the voters. This Court stated,

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[34] *See, Lukas v. Forty-Fourth Gen. Assembly of the State of Colorado*, 377 U.S. 713 (1964); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School Dist, supra n.22*; *and, Romer v. Evans*, 517 U.S. 620 (1996).

[35] *Rogers v. Lodge*, 458 U.S. 613 (1982) (election system); *Washington v. Davis*, 426 U.S. 229 (1976) (employment test); *Arlington Heights* (zoning variance); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (dual system of education); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (voting restrictions); *and see, Lukas* at 736. Absolute or qualified immunity is a sufficient defense to protect public officials in an action for damages for their illegal acts. It is unclear if the Solicitor General is arguing that the "sham defense" would be available only in actions for damages or might apply even in actions for injunction or declaratory relief, which would allow a municipality to eviscerate the rights of a citizen in Buckeye's position.

[36] *Hunter v. Erickson*, 393 U.S. 385 (1969).

"[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."[37]

Initiatives and referenda cannot be used as instruments of discrimination. Individual rights cannot be eviscerated by a majority vote, nor may officials immunize their illegal acts by having them ratified by a majority vote of the electorate.[38] "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[39]

II. RESPONDENTS ARE WITHDRAWING THE DISPARATE IMPACT CLAIM

Respondents have consistently presented and will continue to rely on statistical evidence of discriminatory effects to prove the City's intent to discriminate. While Respondents successfully argued below that such evidence supported a separate claim under the disparate impact theory, Respondents are explicitly withdrawing and abandoning their disparate impact claim in this litigation.[40]

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[37] *Id.* at 392.

[38] *Lukas* at 736.

[39] *W. Va. State Bd. of Educ. v. Barnett*, 319 U.S. 624, 638 (1943).

[40] Even if Respondents were to pursue a separate disparate impact claim, the City's second question would not be presented by the facts of this case. First, Respondents have never contended that the mere filing of the referendum caused the harm alleged. Instead, it was the delay in the construction of the housing that caused the legal injury. Second, the City's characterization of the referendum as "judicially upheld" is misleading, since ultimately the referendum was not upheld.

III. THE REFERENDUM VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The Due Process Clause of the Fourteenth Amendment prohibits the states and municipalities from depriving individuals of "life, liberty, or property without due process of law."[41] The Due Process Clause has a fundamental role in the land use context and in this case.[42] This is not disputed by the City.[43]

The evidence in the record demonstrates that the City violated Buckeye's lawful right to use of its property.[44] Contrary to the contentions of the City, Buckeye had a protected property interest both through its ownership of the land in question and because of its legitimate expectations in the benefits of the site plan approval, based on the City's zoning code and its approval of the site plan.

The City's actions in stopping the development were arbitrary and capricious. The use of a referendum to decide what was a purely administrative matter was a decidedly unfair process, permitting a group of citizens to gang up on Buckeye for reasons not related to the established legal requirements that had mandated the City's Planning Commission and Council to approve the site

[41] U. S. Const. Amend. XIV.

[42] James Madison, *NOTE TO HIS SPEECH ON THE RIGHT OF SUFFRAGE*, in 3 The Records of the Federal Convention of 1787, at 450 (Max Farrand ed., 1937) ("In civilized communities, property as well as personal rights is an essential object of the laws . . . the rights both of property [and] . . . of persons ought to be effectually guarded.").

[43] *Petitioners' Brief on the Merits*, pp. 27-28.

[44] The other party, FHCS, did not raise any due process claim in the complaint.

plan. Because it provided for and acted upon an illegal referendum process which resulted in a multi-year delay of Buckeye's approved development, the City can be held liable for a violation of substantive due process.

A. BUCKEYE POSSESSED A PROPERTY INTEREST

This Court has never determined what is necessary to constitute a property right protected by the Due Process Clause in a land-use context. The Second and Fourth Circuits will find a constitutionally protected property interest only where a strict entitlement test is met.[45]

The entitlement test is based on the analysis in *Board of Regents v. Roth*.[46] *Roth* requires a plaintiff to demonstrate a "legitimate claim of entitlement" to a benefit in order to establish a constitutionally protected property interest, and requires the legitimacy of such a claim to be demonstrated by reference to state laws or other understandings independent of the Constitution.

An alternative to the strict entitlement view is found in certain decisions from the Third, Sixth, and Seventh Circuits. These decisions have taken a more protective view of property rights. In *DeBlasio v. Zoning Board of Adjustment*, the court rejected a zoning board's argument that a landowner must demonstrate a "legitimate claim of

[45] *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995); *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992).

[46] *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution . . . .").

entitlement" to a zoning variance denied by the government.[47] Instead, the Third Circuit held that the ownership of land, by itself, is a property interest worthy of constitutional protection from arbitrary zoning decisions.[48] As the *DeBlasio* court explained, " . . . one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership."[49]

The Sixth Circuit has wrestled with this issue. In *Pearson v. City of Grand Blanc*, the court stated, "this circuit has implicitly recognized that mere ownership of property subjected to zoning is a property interest sufficient to invoke due process."[50]

The Seventh Circuit has addressed this issue several times, though not always very directly: "[b]ecause the property interest in such a case is apparent – it is the ownership interest in the land itself – the interest is often assumed without discussion."[51]

The most cogent explanation of the historical context for the constitutional protection of real property was given

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[47] *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600-01 (3rd Cir. 1995), *cert. denied*, 516 U.S. 937 (1995).

[48] *Id.*

[49] *Id.* at 601.

[50] *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1218 *n.*29 (6th Cir. 1992). Subsequently, however, a different panel of the Sixth Circuit held that "before [a plaintiff] can establish a violation of substantive due process, he must demonstrate that he had a property interest in the use of the undeveloped parcel as a condominium complex." *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). *See also*, *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995).

[51] *Polenz v. Parrott*, 883 F.2d 551, 556 (7th Cir. 1989).

in *River Park, Inc. v. City of Highland Park.*[52] Judge Easterbrook explained that reference to property in the U.S. Constitution reflects its Lockean heritage.[53] Without such protection, Judge Easterbrook pointed out, the government could say, ominously, "we may put your land in any zone we want, for any reason we feel like [and thus] abolish all property rights in land overnight."[54]

The circuits are clearly split on this issue.[55] This Court can alleviate the confusion by affirming that the "right of [a landowner] to devote [his] land to any legitimate use is properly within the protection of the Constitution."[56] The Court should recognize that ownership of land by itself entitles the landowner to freedom from arbitrary or irrational interference with the use of that land.[57] Such an approach values property rights highly and should replace

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[52] *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994).

[53] *Id.* at 165-66. *See also*, *Amicus Curiae Brief* of Pacific Legal Foundation and Center for Equal Opportunity, pp. 23-29.

[54] *River Park* at 166.

[55] An excellent review of the conflict in the circuits on this issue is found in Daniel R. Mandelker, *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 2: Property Rights: Entitlement to Substantive Due Process: Old versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 61 (2000).

[56] *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

[57] *Buchanan v. Warley*, 245 U.S. 60, 74 (1917). "Property," Justice Day wrote, "is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."

the strict entitlement test, which can leave arbitrary governmental land use decisions unexamined.[58]

Buckeye can meet either standard for establishing a property interest. Obviously it can show ownership of the real property in question. And, contrary to assertions within the Petitioners' Brief, Buckeye can show a "legitimate claim of entitlement," sufficient to demonstrate justifiable expectations of receiving the benefits of the approved site plan and receiving building permits.[59]

Under Ohio law, it is clear that a landowner who submits a plan for development of the land that complies with the applicable zoning and planning laws and regulations has a legitimate entitlement to proceed with that plan. Ohio law regarding the vesting of rights in the use of real property is found in the case of *Gibson v. Oberlin*.[60] The Supreme Court of Ohio held in *Gibson* that, "where . . . a property owner has complied with all the legislative requirements for the procurement of a building permit and his proposed structure falls within the use classification of the area in which he proposes to build it, *he has a right to such permit, and there is a duty on the part of the officer charged therewith to issue it.*"[61]

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[58] "The Fourteenth Amendment, if nothing else, was aimed at protecting the rights of individuals against states. If the state can so facilely and conclusively define those rights out of existence, the Fourteenth Amendment becomes, to a great extent, a dead letter. . . . " *Greene v. McGuire*, 683 F.2d 32, 37 (2nd Cir. 1982) (Oakes, J., concurring).

[59] *Petitioners' Brief on the Merits*, pp. 29-31.

[60] *Gibson v. Oberlin*, 171 Ohio St. 1 (1960).

[61] *Gibson* at 5-6 (1960) [*emphasis added*]. *And see, Nunamaker v. Bd. of Zoning Appeals*, 2 Ohio St. 3d 115 (1982); *State ex rel. Fairmount*

(Continued on following page)

Since the property was already zoned for multi-family housing and the site plan met all the requirements of the City ordinances, Buckeye had an absolute right to approval of the plans as submitted.[62] That Buckeye's site plan met all the legal requirements of the City's zoning code is not disputed. Planning Director Sharpe testified that the site plan met "all the necessary requirements set forth that had to be considered for approval."[63] Councilwoman Hummel considered that after getting the site plan, obtaining a building permit in Cuyahoga Falls was not difficult. "When you meet all the requirements to build a building, they will be approved. There is not a basis on which to turn them down. They are not going to submit something that is not acceptable building standards."[64] Buckeye met all the legal requirements and it possessed an entitlement that is constitutionally protected.

Buckeye had every reason to expect that in purchasing property zoned for its intended purpose, and in creating at considerable expense a conforming site plan that was then approved by the Planning Commission and eventually by Council, it would be able to proceed and enjoy the benefits of the site plan approval, be issued the necessary building permits, and construct the planned

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Ctr. Co. v. Arnold, 138 Ohio St. 259 (1941); *State ex rel. Ice & Fuel Co. v. Kreuzweiser*, 120 Ohio St. 352, 354 (1929); *In re Appeal of Clements*, 2 Ohio App. 2d 201 (1965).

[62] *See, Woodwind Estates, Ltd. v. W. J. Gretkowski*, 205 F.3d 118, 122 (3rd Cir. 2000) (Township's approval of development plan required when developer complies with all objective criteria for a subdivision).

[63] Tr. 139-40.

[64] App. 165. *And see*, Report of Professor Allen Fonoroff, App. 103-09.

housing development. Thus, Buckeye had a cognizable property interest created by the City's zoning ordinance, and as such, a constitutionally protected property right.

B. THE CITY'S ACTIONS VIOLATED SUBSTANTIVE DUE PROCESS

As Buckeye held a protected property interest, the Due Process Clause of the Fourteenth Amendment guarantees the right to be free from arbitrary or irrational governmental actions that infringe upon that interest.[66] As this Court has stated, due process "demands . . . that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained."[66] Therefore, substantive due process rights protect property owners from any irrational or arbitrary interference with their property rights, including arbitrary or irrational interference with processing a land-use permit.

Petitioner argues that Buckeye had an adequate remedy under state law.[67] The requirement that a plaintiff prove the lack of an adequate remedy under state law comes from procedural due process cases in which a deprivation of liberty or property without prior notice or

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[66] *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

[66] *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980), quoting, *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

[67] *Petitioners' Brief on the Merits*, p. 28. Petitioners never raised this issue in the District Court, the Court of Appeals or in the Petition for Certiorari. Thus, the argument should be disregarded by this Court. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 *n.*3, 321 (1999), *and*, *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189, 195 *n.*2 (1989).

opportunity to be heard is challenged.[68] That doctrine has no application to a substantive due process claim because "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"[69] Thus, regardless of the availability of state remedies, Buckeye's substantive due process claim can be addressed.

1. A REFERENDUM ON QUASI-JUDICIAL OR ADMINISTRATIVE LAND USE DECISIONS IS A PER SE SUBSTANTIVE DUE PROCESS VIOLATION

The right of the people to the use of direct democracy is not absolute.[70] Under our form of government the federal judiciary is the safeguard of our liberty and property, not only from the government, but from arbitrary and unlawful acts of the majority. As James Madison recognized:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents,

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[68] *See, e.g., Parratt v. Taylor*, 451 U.S. 527 (1981).

[69] *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), quoting, *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

[70] *James v. Valtierra*, 402 U.S. 137, 143 *n.*4 (1971). An excellent discussion on the balancing and tension between the right of participatory democracy and private property rights is found in Hans A. Linde, *When Is Initiative Lawmaking Not Republican Government?* 17 HASTINGS CONST. L.Q. 159, 161 (1989).

> but from acts in which the Government is the mere instrument of the major number of the Constituents.[71]

The *City of Eastlake v. Forest City Enterprises, Inc.* Court recognized that "as a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause ... when applied to a *rezoning ordinance*."[72] However, *Eastlake* held that voters can be empowered to act as legislators provided that the action they are empowered to take is legislative.[73] *Eastlake* was a rezoning case and thus the referendum there was on a legislative matter. The City's decision to approve Buckeye's site plan, however, was purely administrative.[74]

A zoning law, unlike an administrative or judicial decision on a site plan, applies directly to a whole class of people. The smaller the class affected by a nominally legislative act, the greater the danger of the denigration of the class members' rights. The class here is one – Buckeye. Buckeye was the only developer ever to face a site plan referendum in over thirty years that the City Charter had such a provision.

The City Charter that is challenged in this case did not authorize the voters to determine, in the manner of zoning, whether a particular parcel or entire area should be used for a specific purpose or use such as the situation

[71] *Reitman v. Mulkey*, 387 U.S. 369, 391 (1967) (Douglas J., concurring), quoting, 5 *Writings of James Madison*, 272 (Hunt ed. 1904).

[72] *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976) [*emphasis added*].

[73] *Id.* at 674 *n.*9.

[74] *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St. 3d 539 (1998).

in *Eastlake*. Instead, it authorized voters, with the City's imprimatur, to act as a Super Planning Commission or court to decide if a site plan they had never seen conformed to a zoning code they had never read.

In a typical zoning or rezoning case, prospective uses of property are at issue, and decision-making is likely to be based on general, legislative grounds.[75] Voters are likely to consider whether they want a building "like that" in their neighborhood. As was the case in Cuyahoga Falls, a targeted site plan referendum calls on the voters to decide whether very technical documents and plans meet the existing laws already approved by their City's zoning code, which permits a building "like that" in their neighborhood.[76] However, such an evaluation on the conformity to

[75] As Justice Holmes pointed out, writing for the Court in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226-27 (1908) (*citations omitted*), "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

[76] It is this distinction between *Eastlake* and the facts of the Buckeye litigation which requires the opposite result. As Chief Justice Burger explained:

> The situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land; instead, it involves an effort to change a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner's seeking approval of a new use free from the restrictions attached to the land when it was acquired.

Eastlake at 678-79 *n.*13. The situation that the *Eastlake* Court said was not presented then *is* presented here: the Cuyahoga Falls referendum *did* impair existing rights.

legal requirements is in the domain of an agency or for the adjudication of a judge.[77] In a recent case from the Seventh Circuit, Chief Judge Posner recognized that such decisions should not be left to the voters: "[s]o the issue 'is not too much delegation, but delegation to the wrong body: delegation of an administrative or judicial decision-making, for example, to people who are not administrators or judges.'"[78] By adopting such a *per se* rule this Court can alleviate the confusion, at least involving cases of referenda on land use issues, setting forth a standard that will carefully balance the values of democracy and property rights.

2. THE SITE PLAN REFERENDUM VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT DELEGATES TO VOTERS THE POWER TO PROHIBIT A LAWFUL USE OF BUCKEYE'S LAND

Should the Court decline to adopt a *per se* rule that prohibits referenda on administrative/judicial decisions on land use issues, there is an alternative rule that can be found in a trio of this Court's early land use decisions. In

[77] The Arizona Supreme Court has used this principle in holding that zoning by initiative poses an irreconcilable conflict with the Due Process Clause of the United States Constitution. *Transamerica Title Ins. Co. Trust v. City of Tucson*, 157 Ariz. 346 (1988); *City of Scottsdale v. Superior Court*, 103 Ariz. 204 (1968). *And see*, the following state supreme court cases: *Fasano v. Bd. of County Comm'rs*, 264 Ore. 574, 580-81 (1973); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 298-299 (1972); *Snyder v. City of Lakewood, Colo.*, 189 Colo. 421, 423-24 (1975).

[78] *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000), quoting, *United Beverage Co. of South Bend, Inc. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 159 (7th Cir. 1985).

Eubank v. City of Richmond and *Seattle Trust Co. v. Roberge* the Court struck down ordinances that delegated legislative power over land use decisions to neighboring landowners.[79] In both *Eubank* and *Roberge*, this Court pointed out that the offending provision conferred the power on some property holders to virtually control and dispose of the property rights of others, but created no standard by which the granted power was to be exercised.

In between those two decisions, the Court was faced with a somewhat similar factual situation, but came to the opposite result. In *Thomas Cusack Co. v. Chicago*, an ordinance prohibited the erection of billboards in designated blocks, but allowed this prohibition to be modified with the consent of those who were to be most affected by the modification.[80] The ordinance in *Eubank* allowed property owners to impose restrictions on another property, while in *Cusack*, the ordinance permitted one-half of the property owners to remove a restriction from other property owners. The ordinance in *Cusack* was upheld.

Thus, in these decisions, the Court has instructed that in order for a delegation of governmental authority to private citizens to survive a due process challenge, two criteria must be satisfied: "First, the underlying exercise of authority must be a reasonable regulation within the power of the government. Second, the legislature's restriction must be in the form of a general prohibition, and the

[79] *Eubank v. City of Richmond*, 226 U.S. 137 (1912), *and*, *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928).

[80] *Thomas Cusack Co. v. Chicago*, 242 U.S. 526 (1917).

delegation must be in the form of permitting private citizens to waive the protection of that prohibition."[81]

Applying these criteria, the Charter's grant of referendum rights on "any ordinance or resolution passed by Council" violates substantive due process.[82] The Charter does meet the first part of *Cusack*'s two-part standard. It cannot be disputed that the requirement of a site plan approval is a reasonable regulation within the power of the government. However, the Charter provision allowing the disputed referendum fails to meet the second part of the test.

The City's zoning code, which permits development within its guidelines, cannot be thought of as a general prohibition. The City, by enacting its general land use plan, approved the development of apartments on the particular property owned by Buckeye. Moreover, the charter referendum provision did not provide for citizens to waive restrictions to permit development. Instead, much like the delegations to citizens struck down in *Eubank* and *Roberge*, the Cuyahoga Falls referendum allowed voters to prevent development and impose an absolute restriction on the proposed land use plans. Therefore, the City's referendum on Buckeye's site plan, lacking all standards to guide the decision of the voters, permitted the police power to be exercised in a standardless, and hence, arbitrary and capricious manner in violation of this Court's *Eubank* and *Roberge* decisions.

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[81] *Silverman v. Barry*, 845 F.2d 1072, 1086 (D.C. Cir. 1988), citing, *Cusack* at 528, *but see, Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88 (1st Cir. 1981).

[82] App. at 14.

3. THE CITY'S DENIAL OF BUCKEYE'S SITE PLAN WAS ARBITRARY AND CAPRICIOUS AND A DENIAL OF SUBSTANTIVE DUE PROCESS

If this Court decides not to adopt a more uniform standard regarding land use referenda, it should still affirm the Sixth Circuit opinion based upon existing precedent holding that the essential purpose of due process is "to secure the individual from the arbitrary exercise of the powers of government."[83] In determining whether governmental conduct reaches the threshold of being so arbitrary or irrational as to violate the Substantive Due Process Clause, courts are to view the totality of the circumstances in which the governmental action occurred.[84] This case-by-case analysis has been traditionally utilized by Courts of Appeals in land use cases.[85]

A review of the totality of the circumstances surrounding the denial of Buckeye's site plan for the Pleasant Meadows development, especially when considered in the light that all inferences are to be drawn in favor of the non-movant, supports the conclusion that the Sixth Circuit's opinion requiring a trial on Buckeye's substantive due process claim is correct. The facts show that Buckeye's

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[83] *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

[84] *Sacramento v. Lewis*, 523 U.S. 833, 850-51 (1998).

[85] *See, e.g., Blanche Rd. Corp. v. Bensalem Twp.*, 57 F.3d 253, 267-68 (3rd Cir. 1995) (holding township officers' obstruction of building permit process for reasons unrelated to merits of permit application sufficient to state a substantive due process claim); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508-09 (9th Cir. 1990).

property interest was arbitrarily and capriciously denied by the City.

Buckeye reasonably expected that in purchasing property that was zoned for its intended purpose and in working up, at considerable expense, a site plan that was then approved by the City, it would be issued the necessary building permits and would construct the planned housing development. To be denied the building permits because of the City's *own* illegal referendum process is precisely the sort of "arbitrary and capricious" action that has been found to violate the right to due process.[86]

Moreover, there are particular factual circumstances illustrating the arbitrary nature of the City's interference with Buckeye's use of its property. For instance, the fact that Mayor Robart assured Buckeye that it would have "no problem" building a tax credit development on the Pleasant Meadows site. JA 1380-82. Relying on that assurance and the existing zoning code, Buckeye paid a premium price for the property. JA 724, 728-30. Another special circumstance is the nature of the tax credit program and the effect of a failure to build a project for which tax credits were granted within the program's strict time limits. Under the program, a developer who fails to complete a development on time not only loses the credit for that project but is also barred from applying for grants to support other tax credit developments in the future. Tr. 50-51; R. 193-94. City officials were aware of the time pressures on Buckeye. App. 157, 763; JA 943.

[86] *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981).

Evidence that the challenged decision was due at least in part to an improper or illegal motive is indicative – in fact, it can even be dispositive – that the decision was not made on a rational basis.[87] As detailed above, there is ample evidence that the referendum and the denial of the site plan were based on the race and familial status of the expected population of Pleasant Meadows. For instance, there were comments and statements inferring that problems would beset the community because of the race of expected residents; statements by the Mayor suggesting that the City would outlast Buckeye in litigation; evidence that members of Council were desperately seeking some pretext upon which to base the site plan denial; as well as the peculiar factual circumstances surrounding the denial of the building permits after the site plan had been approved by Council, including unprecedented orders issued before the certification of the referendum petitions.

It is uncontested that Buckeye's development plan met all the zoning requirements. The referendum was

[87] *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991) ("Thus, allegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs' application, may support a finding of substantive due process violation."), citing *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988); *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989) (City Council's deliberations tainted by impermissible religious considerations); *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995) (an improper motive on behalf of a town in revoking the permit was violative of substantive due process); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982) (government's action may violate substantive due process if "fundamental procedural irregularity, racial animus, or the like" is shown).

based on public animus towards the future residents of the development, and not at all on the technical requirements of the plan, which had been approved by the Planning Commission and City Council. Thus, the City did not have a legitimate interest in preventing the construction of the apartment complex.[88] Allowing the voters of the City to overturn a site plan approval which would be mandated under the existing zoning code was in itself an arbitrary and capricious restriction on Buckeye's use of its property. The character of the denial is even more obvious when the evidence of the racial and anti-children motives of City officials and petition drive organizers is taken into account.

The City maintains that it had no choice in taking the actions about which Buckeye complains because it just "followed its charter and state law" and further states that it "took the only action available to it and continued to honor the preemptive effect of the referendum on its ability to issue permits."[89] The City asks this Court to absolve it from any responsibility as if the source of the law that the City followed was imposed upon the City by another authority.

Buckeye urges the Court to reject this "devil-made-me-do-it" defense, in that the law the City points to as providing a rational basis for its actions is *its own law*. The City promulgated its own charter that provided for an

[88] In a remarkably analogous case, a city decided to prevent the building of an apartment complex because a referendum had indicated overwhelming resistance. *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981) (public outcry against a project does not evince a legitimate state interest to prevent such a development).

[89] *Petitioners' Brief on the Merits*, pp. 31-32.

unlawful referendum on an administrative matter, and the City itself acted illegally pursuant to that charter.[90] The City now seeks a ruling by this Court that would allow a municipality to deprive citizens of fundamental property or liberty rights simply because the municipality has passed an ordinance or a charter provision permitting that deprivation.

While this Court has shown due deference to the people's right to legislate directly, it has also struck down such conduct when it violates the U.S. Constitution. As this Court explained, " . . . if the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction."[91] Referenda that violate minorities' constitutional rights are not sacrosanct.[92] The decision of the Court of Appeals holding that there are genuine issues of fact that would permit a finding that the City's actions were arbitrary and capricious and constituted a substantive due process violation should be affirmed.

[90] The City argues in its brief that the referendum process was perfectly legal until the Ohio Supreme Court ruled it otherwise. This ignores Ohio law on the retroactive effect of case decisions. As explained in *Zagorski v. South Euclid-Lyndhurst Bd. of Edn.*, once overruled, Ohio case law is as if it never existed. *Zagorski v. South Euclid-Lyndhurst Bd. of Edn.*, 15 Ohio St. 3d 10, 12 (1984).

[91] *Eastlake* at 676.

[92] *See, Reitman v. Mulkey*, 387 U.S. 369, 391 (1967); *Seattle Sch. Dist. No. 1, supra n.*22; *Romer, supra n.*34.

CONCLUSION

This Court should affirm the decision of the Court of Appeals, holding that there are genuine issues of fact that the Petitioners' actions discriminated on the basis of race and familial status in violation of the Fourteenth Amendment and the Fair Housing Act, and that the City's actions were arbitrary and capricious, and constituted a substantive due process violation.

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Supreme Court, U.S.
FILED
DEC 30 2002
CLERK

No. 01-1269

IN THE

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, ET AL.,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' housing project has been built; the only claim remaining is one for damages allegedly arising from the timing with which petitioners issued building permits for the project. But, as demonstrated in our opening brief (at 3-5, 9-12), every official discretionary action of petitioners *supported* the project; and, under the then-binding City Charter (adopted and in effect since 1959), petitioners had no discretion to issue building permits while a petition for a referendum election was pending.

For this reason, as the opening brief further showed (at 9-20), contrary to the Equal Protection Clause and Fair Housing Act ("FHA") analysis of the Sixth Circuit, respondents do not have a cognizable claim against petitioners based on alleged discriminatory motives of the referendum petitioners: While such evidence would be relevant to whether government officials had denied a racially-mixed housing project for illicit purposes, it is legally irrelevant to the entirely distinct government action challenged here — to wit, petitioners' compliance with their legal duty under the City Charter to hold an election on the petition (and to withhold building permits pending the outcome of that election). Petitioners' compliance with the City Charter did not itself deny the equal protection of the laws or rights under the FHA; treating respondents' desired ordinance in the same way and on the same schedule as all other ordinances subject to referendum petitions would be treated cannot possibly constitute the differential treatment necessary for an Equal Protection and/or FHA violation. Moreover, the First Amendment would not permit petitioners to deny citizens their basic right to petition for, and hold, legally-mandated elections on the basis of alleged illicit viewpoints and motives of the petition's supporters.

As the opening brief also showed (at 15-20), the evidence upon which respondents rely is legally insufficient to establish that illicit bias was a causative motivation for the petition signed here by over 4,300 citizens. And, as the opening brief further showed (at 21-26, 26-32), there is no triable disparate

impact claim here under the FHA, and petitioners' compliance with the City Charter neither interfered with a protected property interest nor constituted arbitrary or capricious conduct. The arguments made in opposition are meritless.

I. RESPONDENTS' INTENTIONAL DISCRIMINATION CLAIMS ARE LEGALLY UNFOUNDED.

The Sixth Circuit held (Pet. App. 12a-13a, 17a, 22a, 23a) that respondents could establish intentional discrimination with proof that petitioners "gave effect" to alleged biases of private citizens by "allowing the fate of the project to be decided by referendum" and withholding building permits pending that popular vote. Respondents' brief, and those of their *amici*, are not so much a defense of the Sixth Circuit as they are an effort to change the subject. Their efforts fail.

1. Respondents and the National Fair Housing Alliance, *et al.* ("NFHA") principally argue (Resp. Br. 11-26; NFHA Br. 5-20) that petitioners acted in concert with private citizens to delay and stop the housing project for racial and/or anti-familial reasons. This argument is legally and factually unfounded.

First, with the exception of the obligatory withholding of permits, every official action of petitioners *supported* the housing project. Both the Cuyahoga Falls Planning Commission (JA 26) and the City Council (JA 17) voted in favor of the project. The Mayor withheld a veto (Pet. App. 93a). The City Engineer in turn granted a permit for the part of the project — the construction of a fence — unaffected by the filing of the petition. (JA 53-54). And when the City Council reconsidered the ordinance approving the project, it did not repeal the ordinance, as it was empowered to do. (JA 14-15; Tr. 196). In short, when respondents complain (Resp. Br. 12-17) that City officials imposed conditions on the project (that respondents accepted), urged citizens to express their concerns, postponed the City Council vote for a few weeks while further consideration was given to the matter, looked for legal ways to disapprove the proposed project, and even explored the

possibility of being sued, they overlook that all of petitioners' official discretionary acts were *in favor of* the project; indeed, none of the pre-decisional deliberative activities complained about even arguably caused the injuries alleged here.

Second, while the City Engineer withheld building permits pending the election, he had no discretion to do otherwise. The then-binding City Charter clearly prohibited the City and its officials from giving effect to the site plan approved by the City Council while the referendum petition was pending. (JA 14-15). Moreover, contrary to respondents' suggestion (Resp. Br. 24), petitioners were legally obliged to comply with the City Charter until it was held invalid.

Third, contrary to respondents' argument (Resp. Br. at 24-25), petitioners could not reject the referendum petition. Under State law, "if the petition is in proper form and contains sufficient signatures, the city's duty under this charter is to certify the initiative ordinance." *Ohio ex rel. Bond v. Montgomery*, 580 N.E.2d 38, 42 (Ohio Ct. App. 1989); *see also Stevens v. Bd. of Elections*, 160 N.E.2d 366, 367 (Ohio Ct. App. 1957) (filing of petition with requisite number of valid signatures "require[s] submission of the question to the electors"). Here, there is no claim that the petition was not in proper form or lacked the requisite signatures.

Fourth, contrary to the suggestion of NFHA (at 10), the City Council could not, at the May 28, 1996 meeting where it reconsidered its site plan ordinance, have declared the ordinance an "emergency" and thereby have effectively overridden the "automatic stay" effected by the petition. Under the City Charter, once the referendum petition was filed, the City Council's only option was to "repea[l]" the ordinance or "submit[] it to a vote of the electors" (JA 14, 15). Simply declaring the ordinance an "emergency" to circumvent the effect of the referendum petition was not an available option.

Finally, respondents' wild assertion (Resp. Br. 17-19, 26) that "the referendum was the end product of a posse, led by

Mayor Robart," is baseless. In dismissing claims asserted against Mayor Robart in his individual capacity, the district court found that "there is no proof that the Mayor contributed to the referendum process aside from lending support by answering some procedural questions," and that "[t]he facts in evidence do *not* sustain Plaintiffs' unsupported assertions that the Mayor organized the petition drive in question, that he secured meeting places for the citizen group opposed to the project, that he certified the petition, or that he submitted the referendum question to the Board of Elections." (Pet. App. 128a-29a (emphasis in original); *see also id.* at 50a ("There is no evidence that the Mayor had any authority to carry out these administrative tasks or that he had a hand in facilitating them.")). Respondents did not appeal these rulings and thus have waived any challenge to them. *See G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982).

The record in fact shows that petitioners did not initiate or lead the referendum effort. Frank Pribonic, one of the organizers, testified that the idea for the petition came from his son-in-law (JA 88) and that no official or employee of the city helped with it. (JA 87) ("[W]e did it on our own."")). Contrary to respondents' claim (Resp. Br. 17-18), the Law Director merely explained to the City Council that the ordinance "does not inhibit the public's right to initiate a referendum." (JA 174).

Indeed, it does not matter whether the Mayor or any other City official supported the referendum. The Mayor was entitled to express his personal views (as were other City officials). The Mayor had no official responsibility for the petition. The same is true for the other City officials who respondents complain about. The filing of a referendum petition was a power reserved to the voters, and was not an authority of the Mayor or these other City officials. Accordingly, any support that they allegedly gave to the referendum drive (through extracurricular activities) is legally irrelevant and cannot subject the City treasury to damages. *See, e.g., Bd. of County*

Comm'rs v. Brown, 520 U.S. 397, 400 (1997) (42 U.S.C. § 1983 does not "impose liability on a municipality unless *deliberate action* attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights"); *see also Screws v. United States*, 325 U.S. 91, 111 (1945) (acts of State officers "in the ambit of their personal pursuits" are not state action); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 741 (1998) (discussing "scope of employment" and related "agency" principles under Title VII).

In sum, there is no legal or factual basis for respondents' "concerted campaign" argument. The pre-decisional activities of petitioners to which respondents point did not result in adverse action by petitioners. Nor are they probative of petitioners' reasons for withholding the desired building permits pending the election. Those reasons were necessarily non-discriminatory ones, as the withholding of the permits was compelled by the City Charter.

2. Citing cases involving statutes and referenda enacted into law, respondents and the Lawyers' Committee, *et al.*, alternatively argue (Resp. Br. 26-31; Lawyers' Committee Br. 6-20) that this Court has long considered private animus to be probative of governmental purpose and that there is sufficient evidence here that petitioners embraced this private animus. This argument, which shares premises of the Sixth Circuit's defective reasoning, is also legally unsound.

First, to be clear, this case does not concern an enacted referendum. The referendum here never went into effect; to preserve their state court challenge to the City Charter, respondents suggested and the parties agreed to a stipulated order barring certification of the election results. (Pet. App. 7a). Accordingly, respondents do not claim that their injuries are attributable to the result of the referendum vote itself. Rather, respondents claim that their injuries are attributable to the referendum process and the time that passed while, pursuant to the City Charter, petitioners withheld building permits pending the results of that process.

Second, because the referendum never went into effect, the cases upon which respondents and their *amici* rely are entirely unhelpful to them. Those cases merely hold that, in appropriate circumstances, evidence of private animus may be probative of the intent of official action, whether by statute, referendum, or administrative decision. *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 257-60 (1977); *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967). These cases do not suggest that private animus in invoking an earlier created procedural requirement creates a genuine factual issue concerning the intentions of government officials (such as the Clerk or the City Engineer) in connection with non-discretionary acts (such as those required by the City Charter). Equally important, these cases do not imply (much less hold) that a discriminatorily motivated referendum petition is itself actionable under the Equal Protection Clause and/or the FHA.

A statute or referendum in effect can itself deprive an individual of "the equal protection of the laws" (U.S. Const. amend. XIV, § 1). It can also effectuate one of the enumerated acts prohibited by the FHA (Pet. App. 259a-260a). In contrast, a petition to have an election cannot by itself legally do so.

Rather, a referendum petition merely provides for a public debate and popular vote about proposed housing. *See James v. Valtierra*, 402 U.S. 137, 140-43 (1971). Accordingly, a referendum petition is not itself ripe for equal protection or FHA challenge, because there is no final official action at that point. *See, e.g., Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (holding equal protection challenge to INS regulations unripe where "the Act requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations"); *Pennell v. City of San Jose*, 485 U.S. 1, 11 n.5 (1988) (holding equal protection challenge to rent control ordinance unripe because the provision had not yet been finally applied to the landowners' tenants and was discretionary); *Oxford House, Inc. v. City of Virginia Beach, Virginia*, 825 F. Supp. 1251, 1260-61

(E.D. Va. 1993) (same). Indeed, because the referendum petition does not itself establish any final government action, any alleged Equal Protection and/or FHA injury is too "remote" or "speculative" to be justiciable. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 757 (1984).

Nor does an Equal Protection or FHA claim arise just because, under the long-standing provisions of the City Charter, the filing of the referendum petition prevented petitioners from giving immediate effect to the site plan ordinance of the City Council. The City Charter made clear that, until the citizenry had had an appropriate opportunity to determine the matter for themselves, the ordinance of the City Council was not final. Accordingly, withholding building permits pending the popular vote on the next scheduled election date did not deny equal protection of the laws or rights under the FHA, just as withholding building permits during the time that the City Council reviewed the Planning Commission's decision did not do so. Rather, there was no final governmental action at either point, and neither the Equal Protection Clause nor the FHA gives respondents a legal basis for pretermitting or expediting either step of this mandatory process. *See Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (agency inaction reviewable, if at all, only where "the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities"); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding unripe for challenge an administrative report because "its effect on reapportionment is felt only after the President makes the necessary calculations and reports the result to the Congress"); *Abbot Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (ripeness doctrine "protect[s] the agencies from judicial interference until an administrative decision has been formalized").

Treating respondents' desired ordinance the same way and on the same schedule as all other ordinances subject to referendum petitions would be treated cannot constitute the

differential treatment necessary for a cognizable denial of "equal protection" or rights under the FHA. Treating all ordinances similarly is in fact the antithesis of disparate treatment.

Third, whereas the viewpoints expressed by private citizens may appropriately be considered in determining whether a final governmental action is illegally motivated, such citizen viewpoints may not properly be considered by government officials in determining whether to allow an election petition and/or to withhold building permits pending the election. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also, e.g., Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

Indeed, "the freedom of speech guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (internal citation omitted). For this reason, even wholly *content-neutral* and far less substantial burdens on petitioning have been invalidated, because "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* (invalidating ban on paying petition circulators). *See also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1999) (invalidating prohibition against anonymous petitioning).

Thus, it does not matter whether the referendum organizers had illicit motives. Whether the referendum would pass and be illegal or unconstitutional is hypothetical and not ripe for determination — which is why courts routinely refuse to review the legality of referenda prior to their passage. *See, e.g., Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988); *Ranjel v. City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969); *Mulkey v. Reitman*, 413 P.2d 825, 829 (Cal. 1966) (in bank), *aff'd*, 387

U.S. 369 (1967). Moreover, unless unlawful conduct is imminent, government may not bar speech merely because it advocates unlawful action, even unlawful racist action. *Accord Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Since there is no clear and present danger with a referendum petition, government has no right to deprive either the 10% of the community supporting the petition of their right to engage in "interactive communication concerning political change that is . . . 'core political speech'" (*Meyer*, 486 U.S. at 422), or the remaining 90% of the community of their basic "original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

It is no answer (Resp. Br. 27-30) that "[t]his is not a lawsuit against citizens" but one against the City and its officials. Petitioners cannot be *obligated* to take the very same action against First Amendment rights that is foreclosed to the courts. *See Alexander v. United States*, 509 U.S. 544, 554 n.2 (1993).

Finally, even assuming a legally cognizable claim is presented, respondents and their *amici* err in suggesting (Resp. Br. 11-12, 19-26; NFHA Br. 6-11; Lawyers' Comm. Br. 16-20) that the record supports a finding of intentional discrimination by petitioners. It does not.

It is important to reiterate that the City Charter is neutral on its face and that the actions of the City Clerk and City Engineer, in accepting the referendum petition and withholding building permits pending the election, were ministerial and mandatory. The challenged actions would have thus necessarily occurred and, therefore, cannot be violative of Equal Protection and/or the FHA. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

In addition, respondents cannot even establish that the referendum petition was illicitly motivated. This Court does not appear to have decided whether the intent of multiple citizens on a referendum is a factual question for a jury or a

question of law for a court. *See Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("[T]he extent to which one characterizes the intent issue as a question of fact or a question of law[] will vary in different contexts."). In either event, to establish that a facially neutral petition was illicitly motivated, bias had to be a determining factor in the petition's filing. *See Village of Arlington Heights*, 429 U.S. at 265-66. It is not sufficient to show that a few supporters of the petition were improperly motivated. *See Washington v. Davis*, 426 U.S. at 253 (Stevens, J., concurring) ("[i]t is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process"). Rather, it must be shown that, but for the allegedly improper motivations, the petition would have lacked the requisite signatures. *See Village of Arlington Heights*, 429 U.S. at 265-66; *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810) (noting that "if less than the majority act[s] from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned."); P. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. Ct. Rev. 95, 119-25 & n.144. Yet the record here is barren of evidence about the motivations of the petition's over 4,300 signators. The circumstantial evidence upon which respondents rely is not sufficient to fill this void.

With respect to respondents' projected effects of the referendum (if it passed), there is no evidence that the mass of petition signators were even aware of those projections. Moreover, this Court has held that, where the burden of a facially neutral action falls substantially on the allegedly preferred class as well as on the class against whom discrimination is alleged, there can be no permissible inference of intentional discrimination. *See, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256, 275 (1979) (because "significant numbers of nonveterans are men, and all nonveterans — male as well as female — are placed at a disadvantage," "[t]oo many men are affected . . . to permit the inference that the statute is

but a pretext for preferring men over women"); *accord id.* at 281 (Stevens, J., concurring) ("the number of males disadvantaged . . . is sufficiently large — and sufficiently close to the number of disadvantaged females . . . — to refute the claim that the rule was intended to benefit males as a class over females as a class"). Here, respondents' own statistics establish that any denial of respondents' housing project would have affected large numbers of non-African Americans (up to 75% of the "perhaps likely" residents) and households without children (42% or 43% of the "perhaps likely" residents). (*See* Tr. 214, 216, 218-20; JA 271-90).

Nor is the historical background suggestive of discriminatory motivation by the thousands who signed this facially neutral petition. Citizens in Ohio, including the citizens of Cuyahoga Falls, have a long and rich tradition of using referenda. *See* Richard A. Chesley, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. Cin. L. Rev. 541, 559 (1984). Moreover, while the City Council had previously approved another development for respondents' site, it had done so before the neighboring condominiums were developed (and the proposed project had not involved low-income housing). (JA 43). Thus, when this project was proposed, citizens voiced a host of non-discriminatory concerns — including, among other things, concerns about increased crime, lack of capacity in the schools, increased burden on local police and fire departments, diminishing surrounding property values, traffic, increased population density, damage to the drainage system from the heavy equipment at the site, and possibilities of increased taxes. (JA 39, 40, 41, 42, 153, 177, 183, 186, 187). And, notably, the citizens of Cuyahoga Falls had not sought to prevent another development (on Prange Drive) that, as is conceded (Resp. Br. 20), has a substantial number of African-American residents and households with children. These circumstances belie the systemic discriminatory intent among the petition's 4,300 signators asserted by respondents.

The handful of ambiguous comments upon which respondents rely (Resp. Br. 3-4, 20-21) likewise provide no basis for inferring such systemic discriminatory motives. This Court has long recognized that statements from a small subset of the pertinent decisionmakers are insufficient even for determining legislative intent, let alone for imputation of an illegal motive. *See, e.g., Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 n.26 (1982) (holding that "isolated statements" from the legislative history are "too thin a reed" by which to discern congressional intent); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (noting the insufficiency of "stray remarks in the workplace" as a basis for Title VII liability). Yet the statements upon which respondents rely are few in number; constitute only a small subset of many statements — the vast proportion of which were plainly non-discriminatory — made at meetings attended by at least sixty people; and were directed only at whether the Planning Commission and/or the City Council should approve the housing project, not at whether a petition should be filed. (Tr. 36; JA 35-52, 134-99). Moreover, a fair-housing "tester" attended the organizational meeting for the petition itself and testified that the attendees were counseled that concerns about children and other possibly discriminatory remarks should not be part of the signature gathering effort. (Tr. 292-95, 300). And, most critically, respondents offer no evidence that the persons making the challenged remarks were among those who signed the petition, much less any evidence that the challenged statements are representative of the views of the over 4,300 signators. Respondents' case is rank speculation.

Finally, evidence that the referendum organizers were motivated by bias would not be legally sufficient to establish that petitioners were so motivated — and illegal motivation by petitioners is a necessary element of the claims asserted here. To be sure, evidence that private biases were a motivating cause of a referendum enacted into law might allow a court to enter "minor" and "ancillary" injunctive orders to prevent implementation of that law by non-wrongdoers (such as

petitioners). *See Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399 (1982). But, to obtain damages, such evidence would not be sufficient, because wrongful intent by the defendant is a necessary element of a violation, and because the City and its officials are not vicariously responsible for the citizens' alleged illicit intent (since the citizens are not subject to their "control"). *Id.* at 391-97; *cf. Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (private conduct is not State action unless government has either used "coercive power" to compel the conduct or has been so involved in it "that the choice must in law be deemed to be that of the State"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (same).

II. THE SIXTH CIRCUIT'S DISPARATE IMPACT RULING SHOULD BE REVERSED.

The Sixth Circuit alternatively held (Pet. App. 23a-25a) that respondents could proceed with an FHA disparate impact claim. Although they pursued this claim in both courts below and opposed *certiorari* on the issue (Opp. Br. 7-8), respondents now assert (Resp. Br. 31) that they are "withdrawing and abandoning their disparate impact claim in this litigation." This assertion merits a brief response.

First, respondents' assertion does not deprive the Court of jurisdiction to decide this issue. The adverse judgment of the Sixth Circuit remains in place, and respondents have asked (Resp. Br. 50) that that judgment be affirmed. There is still a "case" or "controversy" requiring resolution.

Second, although petitioners are fully prepared to accept respondents' abandonment of the claim and be done with the issue, the judgment below on this issue should be reversed and the claim ordered dismissed with prejudice. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25-26 (1994). Respondents should also be barred from ever seeking any fees or costs associated with pursuit of this claim.

Third, as with respondents' intent-based claims, there is no final action here ripe for disparate impact challenge; the

petition for an election (and accompanying withholding of building permits) did not decide anything. Moreover, as the United States and respondents' own *amici* agree (U.S. Br. 10 n.1; NFHA Br. 20-22), this single application of the City Charter is not a proper basis for a disparate impact claim. And, as the United States demonstrated in its brief in *Town of Huntington, New York v. Huntington Branch, Nat'l Ass'n for Advancement of Colored People*, No. 87-1961, at 7A-11A, reprinted as Appendix A, both the text and legislative history of the FHA are best understood as requiring illegal intent.

Contrary to the argument of respondents' *amici* (NFHA Br. 23-25; Lawyers' Committee Br. 20-29), recognition of disparate impact claims under Title VII is not a proper basis for recognizing such claims under the FHA. In construing Title VII to allow disparate impact claims, the Court has relied on the distinct purposes of that statute; and it has derived that doctrine from the "adversely affect[s]" language of 42 U.S.C. § 2000e-2(a). *See, e.g., Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136-37 (1976); *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 986-88 (1988). The FHA, however, has different purposes and no such "adversely affect[s]" language; rather, it has the simple "because of," "on account of," and "based on" language that this Court has traditionally read as expressing an intent requirement. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993); *Gen. Building Contractors Ass'n*, 458 U.S. at 388-89 n.15.

Indeed, given the statistical disparities in wealth and income among different races, sexes, religions, etc., allowing disparate impact claims under the FHA would call into question many longstanding and accepted housing practices. As this case demonstrates, it would also empower civil juries to reweigh the myriad non-discriminatory considerations that citizens, government officials, and private businesses consider in adoption of such housing practices (because, unlike Title VII disparate impact claims, FHA claims are subject to jury trial). There is no basis for believing that Congress intended the FHA

to have such radical consequences. *See* R. Reagan, *Remarks on Signing the Fair Housing Amendments Act of 1988*, 24 Weekly Comp. Pres. Doc. 1140-41 (Sept. 15, 1988); R. Clegg, "Home Improvement," *Legal Times*, Oct. 7, 2002, at 60-61.

III. RESPONDENTS' SUBSTANTIVE DUE PROCESS CLAIM IS WITHOUT MERIT.

As a third ground for decision, the Sixth Circuit held (Pet. App. 26a-33a) that respondents had a triable substantive due process claim arising from the "delay" in issuance of building permits. Respondents' defense of this judgment is unavailing.

1. Respondents initially argue (Resp. Br. 32, 33-38) that they had a protected property interest through their ownership of the land — an argument not relied upon by the Sixth Circuit — and through their expectation in the benefits of the site plan approved by the City Council. This argument errs.

First, while respondents plainly have a property interest in the land, that property interest has no relevance. Petitioners have never deprived respondents of the land. This case is only about the time that it took to get building permits.

Second, respondents' argument about the site plan is both wrong and irrelevant. Respondents did not have a protected interest in that site plan, because the then-binding City Charter expressly provided that the approval of the site plan had no effect until, among other things, the time for filing a referendum petition had passed or, if one was filed, any such petition was finally decided. Accordingly, respondents could not claim a legitimate expectation in the benefit of that site plan approval. In any event, respondents have not been deprived of that site plan approval (and have now built the housing project). Thus, that alleged property interest is also irrelevant.

To be sure, respondents complain that they should have been provided with building permits sooner. But respondents did not have a protected property interest in receiving building permits

within a particular time period, much less in a more accelerated time period than that provided for by the City Charter.

This Court's Taking Clause cases establish that delays incidental to a land use approval process generally do not give rise to cognizable claims. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1485 (2002) ("A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."); *First English Evangelical Lutheran Church v. County of Los Angeles, California*, 482 U.S. 304, 321 (1987) (distinguishing "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like"); *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980) ("[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership"). There is no basis for construing substantive due process doctrine to give rise to a damages claim for such delays where the Taking Clause does not.

Moreover, the time that petitioners took to issue the building permits was not extraordinary at all. Respondents applied for the permits in January 1996; the Planning Commission approved respondents' proposed site plan in February 1996; the City Council approved the plan in April 1996; and, after the referendum petition was filed, petitioners scheduled a vote for the next upcoming election (in November 1996). While litigation about this election consumed another two years, it was respondents who sought the consent order barring the certification of the election results; it was respondents who were unable to convince the district court to order issuance of the building permits; and it was respondents who elected not to pursue an original action in the Ohio Supreme Court, and who thereby added to the delay from the litigation. Indeed, it was respondents who chose to secure their time-sensitive tax credits before obtaining building permits, even though they were legally free to proceed in the opposite sequence (and would

have had less risk and obtained additional points from the tax authorities had they done so). (Ohio Housing Finance Agency, "Housing Credit Program Qualified Allocation Plan," Part II(C)(8), at 17, IV(a)(1)-(2), at 32). In short, respondents cannot properly complain that an unreasonable amount of time passed before they received their building permits, much less that they had a protected property interest in the timing of the process. Any "expense and disruption" from the process is not judicially cognizable, *Fed. Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 244 (1980), as it is just "part of the social burden of living under government." *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938).

2. The withholding of the building permits pending the resolution of the referendum petition (by either popular vote or judicial invalidation) was plainly not "arbitrary" or "capricious." The arbitrary and capricious standard "does not mean simply erroneous." *Crider v. Bd. of County Comm'rs*, 246 F.3d 1285, 1289 (10th Cir. 2001) (internal quotation marks omitted); *see also Regents, Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). Rather, "the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 (4th Cir. 1995) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)). Here, submission of the housing project to an election was required by the City Charter and was judicially upheld three times. As such, the withholding of the building permits was not even arguably arbitrary or capricious. Respondents' contrary arguments are in error.

a. Again departing from the Sixth Circuit, respondents argue (Resp. Br. 39-44) that submission of the ordinance to popular vote was a *per se* due process violation. Respondents claim that administrative decisions may not be decided by majority vote, that voters may not be delegated the power to

prohibit lawful land uses, and that it is arbitrary and capricious to allow voters to decide such matters without discernible standards to guide them. Respondents are wrong.

In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), this Court held that requiring proposed land use changes to be ratified by referendum did not violate due process. The Court ruled that "[a] referendum cannot . . . be characterized as a delegation of power" but rather is an exercise of "reserved" power by the people. *Id.* at 672, 673. The Court further found that "[t]he power of initiative or referendum may be reserved or conferred 'with respect to any matter, legislative or administrative, within the realm of local affairs . . . .'" *Id.* at 674 n.9 (quoting 5 E. McQuillan, *Municipal Corporations* § 16.54, at 208 (3d ed. 1969)) (ellipsis in *Eastlake*). In addition, the Court held that due process does not require that voters receive "standards to guide their decision," noting that the requirement of "discernable standards" relates to delegated powers and not to "a power reserved by the people to themselves." 426 U.S. at 675. In short, respondents' arguments were all rejected in *City of Eastlake*.

Contrary to respondents' suggestion (Resp. Br. 40), *City of Eastlake* cannot be distinguished on the ground that it "was a rezoning case and thus the referendum there was on a legislative matter." The *Eastlake* Court expressly held that, consistent with due process, the power of referendum "may be reserved or conferred with respect to any matter, legislative or administrative." 426 U.S. at 674 n.9 (internal quotation marks omitted). Moreover, while disagreeing about its resolution, both the majority and dissenting opinions in the case recognized that the critical question for decision there was whether a citywide referendum for approval of a particular land use proposal was a procedure consistent with due process. *See id.* at 670, 679 & n.13; *id.* at 680 (Powell, J., dissenting); *id.* at 692-94 (Stevens, J., dissenting). The resolution of that question simply did not turn on the fact that the landowner was seeking a "rezoning" or that a rezoning could be characterized as

"legislative" rather than "administrative." *Accord, Pro-Eco, Inc. v. Bd. of Comm'rs*, 57 F.3d 505, 513 (7th Cir. 1995) ("The Supreme Court . . . has held that even the functional equivalent of a petition for a variance may be put to a referendum."); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436-37 (4th Cir. 2002) (*City of Eastlake* allows a referendum on individual building permit).

Indeed, as the *Eastlake* Court noted, many jurisdictions subject all manner of land use matters to referenda, and courts have long sustained those powers. *See, e.g., Barnes v. City of Miami*, 47 So. 2d 3, 4 (Fla. 1950); 5 Eugene McQuillin, *The Law of Municipal Corporations* § 16.54, at 289 (3d ed. 1996) (footnote omitted) (collecting cases). The handful of cases that respondents rely on (Resp. Br. 42 n.77) either do not address any due process issue at all (*see Fasano v. Bd. of County Comm'rs*, 507 P.2d 23 (Ore. 1973) (en banc); *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. 1972) (en banc)), address due process problems stemming from abridgment of the State's own notice and hearing requirements (*see Transamerica Title Ins. Co. Trust v. City of Tucson*, 757 P.2d 1055 (Ariz. 1988) (in banc); *City of Scottsdale v. Superior Court*, 439 P.2d 290 (Ariz. 1968) (in banc)), or have subsequently been construed not to stand for respondents' proposition (*see Margolis v. Dist. Court*, 638 P.2d 297, 305 (Colo. 1981) (en banc) (expressly disclaiming respondents' reading of *Snyder v. City of Lakewood, Colo.*, 542 P.2d 371 (Colo. 1975) (en banc)). And, while *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000), couched its ruling in terms of a legislative/administrative distinction, it clarified that land-use measures that "operate[] prospectively," such as the referendum contingency at issue here, are permissible, and that its holding encompassed only "[t]he lawful destruction of existing property," *id.* at 622, which is not here at issue. In short, respondents' argument is unsupported in the law and, if accepted, would invalidate numerous governmental charters.

b. Respondents also err in suggesting (Resp. Br. 45-49) that they are entitled to a trial on whether there was a rational basis for petitioners' withholding the building permits once the City Council had approved their site plan. The rational basis for petitioners' action was, of course, the provision of the City Charter that did not allow the City Council ordinance to go into effect if a referendum petition was filed.

Contrary to respondents' contention, due process did not require petitioners to determine whether the referendum petition had a rational basis *before* conducting an election on it. No such inquiry was authorized by the City Charter or any other State law; and *City of Eastlake* held that, while the result of a referendum is subject to due process challenge, the fact of the referendum election is not. 426 U.S. at 675-79.

Respondents similarly err in suggesting that, because the City Council approved respondents' site plan, the voters could not rationally reject it. Again, since the site plan was never rejected, that question is not presented. Further, like all zoning codes, this zoning code contains quite general discretionary criteria that the citizenry could rationally apply differently than did the City Council. (*See* JA 13a-14a, 17a-19a). Moreover, in exercising their reserved powers, the citizenry are not limited by the criteria of the zoning code; rather, as *City of Eastlake* held, they are limited only by the Due Process Clause's requirement that the result of their referendum has a rational relationship to the general police power. 426 U.S. at 676. The concerns voiced by the citizens of Cuyahoga Falls would plainly satisfy that requirement.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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No. 87-1961

IN THE

Supreme Court of the United States

October Term, 1987

TOWN OF HUNTINGTON, NEW YORK, ET AL., APPELLANTS,

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Town of Huntington's zoning ordinance, which on its face prevented private construction of multi-family low-income housing outside an urban renewal area, and the Town's refusal to rezone a specific site to permit such construction violated Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, on the basis of findings that the Town's actions had a discriminatory effect on minority residents and lacked sufficiently legitimate justifications.

DISCUSSION

1. This case comes before the Court as an appeal pursuant to 28 U.S.C. 1254(2). Because the court of appeals struck down a portion of the Town's ordinance, and because the Town's jurisdictional statement is fairly understood to challenge that action,[11] we believe that this Court's appellate jurisdiction has been properly invoked. The case is appropriately treated as an appeal because the Town is "relying on a State statute held by a court of appeals to be invalid as repugnant to the * * * laws of the United States" (28 U.S.C. 1254(2)).

In contesting the court of appeals' invalidation of the ordinance (as distinct from its order directing rezoning), however, the Town raises no issue meriting this Court's plenary consideration. The Town conceded below that a discriminatory impact or effects test governs the Title VIII challenge to the ordinance. See Defendants' Trial Mem. 48; Appellees' C.A. Br. 27-29, 37; J.S. App. 16a-17a, 62a-63a. And we do not read the Town even now as arguing to the contrary. It rather appears to pursue the argument, initiated below, that the properly applicable effects test has been misapplied. See J.S. 21-28.

We believe that there is a substantial question, meriting this Court's attention, as to whether an intent test or an effects test governs under Title VIII. Indeed, we believe that the court below, and the other courts of appeals which have addressed the issue, have erred in holding that a showing of discriminatory effect will suffice. Since the court below

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[11] J.S. 29. The Town appears to be concerned primarily with the court of appeals' order of site-specific relief, rather than with the court's striking down of the ordinance. Each of the five questions presented in the jurisdictional statement appears to have as its central focus the court of appeals' action in overriding the Town's refusal to rezone appellees' site for multi-family housing.

decided that discriminatory intent is not an essential element of a Title VIII violation, that issue can be reviewed by this Court. At the same time, if the Court were disposed, contrary to our recommendation, to exercise its discretion to decline to hear the remainder of the case on the merits,[12] see p. 11, *infra*, it would be proper to affirm summarily the court of appeals' partial invalidation of Section 198-20 of the Code of the Town of Huntington. We believe that such an action would be appropriate, however, only to the extent that it made clear that no determination of the proper burden of proof under Title VIII was thereby implied.

2. Such a disposition of the issue on which appellate jurisdiction is predicated would not dispose of the Town's challenge to the court of appeals' order that it rezone the land in issue for multi-family housing. Indeed, the Town primarily emphasizes the rezoning issue in its jurisdictional statement. See J.S. 1-5, 28-30. While this Court need not review the rezoning issue simply because the Court's appellate jurisdiction has been invoked with regard to the accompanying issue of the invalidation of the ordinance, the Court may appropriately exercise its discretion to reach and decide the remaining issue in the case. See *Davis v. Scherer*, 468 U.S. 183, 189-190 & n.7 (1984); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4037, at 62-64 (1988).[13] We believe that the Court should do so here.

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[12] If the Court determines, as we recommend, to consider the rezoning issue on the merits, and thus to review in that context the issue of an intent versus an effects test under Title VIII, we urge the Court simply to note probable jurisdiction, and defer judgment on any aspect of the merits until after briefing and argument.

[13] There is an "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (footnote omitted). See *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (referring to Court's practice of strictly construing statutes authorizing appeals).

The exercise of discretion in the immediate context operates in the same manner that is appropriate for determining whether to grant certiorari. Factors weighing against such an exercise of this Court's discretion are readily identifiable.

First, while the Town has technically preserved the position that an intent test should be applied with regard to the rezoning decision, it appears that the argument for that position has been pressed in an ambiguous and internally inconsistent manner. The Town defended its refusal to rezone principally on the ground that plaintiffs had not properly applied for rezoning. See J.S. 4, 12-13, 15, 28; J.S. App. 79a-80a; Mar. 3, 1988 Tr. of Oral Arg. 30-31, 36-37; R. A-39. Its repeated reference to the *McDonnell Douglas* test was directed primarily to the point that plaintiffs had failed to satisfy a critical element of the prima facie case—the requirement of application. Further, the Town conceded below that a discriminatory effect standard applied to plaintiffs' challenge to the zoning ordinance and argued only that the *McDonnell Douglas* test governed plaintiffs' rezoning claim. See Appellees' C.A. Br. 26-47; J.S. App. 16a-17a, 62a-63a. More to the point, the Town's apparent assertion of two distinct standards under the Fair Housing Act leaves substantial uncertainty about whether and on what basis it is claiming that one must ever prove intentional discrimination. The Town's jurisdictional statement itself contains little reference to that point. Compare J.S. at i with J.S. 20-28.[14]

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[14] In analogous circumstances, this Court has declined to review cases where the

> issues * * * remain unfocused because they (were) not pressed * * * with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation * * *.

United States v. Fruehauf, 365 U.S. 146, 157 (1961).

Further, this is not a case presenting a sharp conflict in the circuits. The courts of appeals have consistently held that the Fair Housing Act does not require proof of intentional discrimination.[15] And, while there are some troublesome discrepancies among the courts regarding the appropriate standard for evaluating the defendant's justifications, these differences do not constitute a clear conflict.[16]

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[15] *E.g.*, *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-149 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289-1290 (7th Cir. 1977) (*Arlington Heights II*), cert. denied, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-1187 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

This Court has not decided what proof the plaintiff must present to establish unlawful discrimination under Title VIII. Cf. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding that a municipality's refusal to rezone a parcel of land violated the Equal Protection Clause only upon a showing of purposeful discrimination; remanding the case for consideration of whether the village had violated Title VIII).

[16] In *Arlington Heights II*, 558 F.2d at 1290, the Seventh Circuit cautioned courts to exercise discretion when considering Title VIII actions premised only on discriminatory effect and instructed courts to evaluate the strength of the defendant's "interest" in taking the challenged action. The Third Circuit, in *Resident Advisory Bd. v. Rizzo*, 564 F.2d at 149, agreed that courts must use their discretion when deciding such lawsuits. Moreover, the *Rizzo* court fleshed out the standard for evaluating the defendant's proffered justification for the challenged action (*ibid.* (footnote omitted)):

> a justification must serve * * * a legitimate, bona fide interest of the * * * defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.

The Eighth Circuit, although using the phrase "compelling governmental interest" in *United States v. City of Black Jack*, 508 F.2d at 1185, to describe the defendant's burden, actually adopted a standard substantially similar to that later adopted by the Third Circuit in *Rizzo*. See *id.* at 1186-1187; see also *Hanson v. Veterans Admin.*, 800 F.2d at 1386 ("showing of a significant discriminatory effect" establishes violation of Title VIII).

Notwithstanding these considerations, we urge the Court to exercise it discretion to review the court of appeals' rezoning decision holding that an effects rather than an intent test is applicable under Title VIII. We reach that conclusion based on the importance of the issue and the incorrectness of the decision below.

The principal operative provision of Title VIII (§ 804(a), 42 U.S.C. 3604(a)), makes it unlawful

> [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

Although proscribing a broad range of conduct, Congress limited that proscription to action taken "because of race."[17] The words "because of" plainly connote a causal connection between the housing-related action and the person's race or color. The proscribed action must have been caused, at least in part, by the individual's race, which strongly suggests a

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[17] Three of the other prohibitions set forth in the Fair Housing Act also pertain to actions taken "because of" race or color. See 42 U.S.C. 3604(b) (terms or conditions of sale or rental), 42 U.S.C. 3604(d) (representation of unavailability of property for sale or rental), and 42 U.S.C. 3605 (denial of financial assistance). One section, pertaining to real estate advertising, bars any indication of "preference, limitation, or discrimination based on race, color * * *" (42 U.S.C. 3604(c)), and another, relating to participation in multiple listing services, prohibits discrimination "on account of" race or color (42 U.S.C. 3606). A final section makes it illegal to attempt to induce any person to sell or rent "by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race (or) color" (42 U.S.C. 3604(e)).

requirement of discriminatory motivation.[18] See *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). An action taken because of some factor other than race, *i.e.*, financial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute.[19]

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[18] Interpretation of similar or related language in various civil rights statutes does not resolve the meaning of Title VIII's "because of" phrasing. On the one hand, Congress has demonstrated its ability unambiguously to adopt an effects test when it wishes to do so. In Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, for example, Congress required covered jurisdictions to seek preclearance of any voting change and to show that such a change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *."

In holding that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, before its amendment in 1982, required a showing of purposeful discrimination, the Court did not discuss that provision's requirement that discriminatory action be taken "on account of race." See *City of Mobile v. Bolden*, 446 U.S. 55, 60-65 (1980); see also *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983) (Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits exclusion from participation in federal programs "on the ground of race," requires proof of discriminatory intent).

At the same time, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court construed the "because of" language in 42 U.S.C. 2000e-2(a)(2) as prohibiting employment practices and that had discriminatory effects and rejected the contention that the language barred only intentional discriminatory practices. See 401 U.S. at 432. The Court has twice reserved the question whether 42 U.S.C. 2000e-2(a)(1), which contains "because of" phrasing, requires a showing of discriminatory intent. See *General Electic Co. v. Gilbert*, 429 U.S. 125, 137 (1976); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977).

[19] The courts of appeals have not presented a plausible alternative reading of the statutory language. In *Resident Advisory Bd. v. Rizzo*, 564 F.2d at 146, for example, the court acknowledged that the "'because of race' language might seem to suggest that a plaintiff must show some measure of discriminatory intent," but rejected this logical consequence in part because such a requirement would unduly burden Title VIII plaintiffs. See

The legislative history reinforces the understanding that Congress intended to require a showing of intentional discrimination.[20] Neither supporters nor opponents suggested that the legislation would ban local zoning regulations merely because they had a racial effect, without any showing that the local government intended to discriminate. Rather, the legislative history shows that Congress sought to eliminate intentional refusals to sell or rent housing because of the race of the renter or buyer and believed that financial ability should remain the most important factor in property transactions. Members of Congress emphasized that the bill was designed to make financial ability, rather than race, the principal

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id. at 146-147. Similarly, in *Arlington Heights II*, 558 F.2d at 1288, the court noted that "[t]he major obstacle to concluding that action taken without discriminatory intent can violate (Title VIII) is the phrase 'because of race' * * *." The court, however, proceeded to embrace "[t]he broad view * * * that a party commits an act 'because of race' whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent" (*ibid.*). This reasoning is directly at odds with *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), where this Court, in defining "discriminatory purpose," stated (*id.* at 279 (citation and footnotes omitted)) that the phrase

> implies more than intent as volition or intent as awareness of consequences * * *. It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

[20] Because Title VIII, as enacted, was offered as a floor amendment, there are no committee reports. The legislative history consists primarily of statements by representatives and senators on their respective floors. Congress also held hearings, the record of which further supports reading Title VIII as requiring intentional discrimination. See *Fair Housing Act of 1967: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 22-23 (1967) (remarks of Sen. Mondale) (bill is "designed to deal exclusively with the refusal to sell or rent for racial reasons, and it does not apply to the existence of other reasons or [sic] does not apply to zoning requirements, ordinances, and the rest").

qualification for purchasing or renting housing. See, *e.g.*, 114 Cong. Rec. 2277 (1968) (Sen. Mondale).

Senator Mondale, a leading sponsor of the legislation, stated: "The bill simply reaches the point where there is an offering to the public and the prospective seller refuses to sell to someone solely on the basis of race." (114 Cong. Rec. 4974 (1968)). Senator Hart echoed these sentiments (see *id.* at 4976). Senator Mondale also emphasized the limits of the bill's prohibitions (*id.* at 5643):

> The bill permits an owner to do everything that he could do anyhow with his property * * *, except refuse to sell it to a person solely on the basis of his color or his religion. That is all it does. It does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American because of his color and that is all * * *.

Not only do the statute's language and legislative history show that a violation of Title VIII requires intentional discrimination, substantial practical problems result if this requirement is discarded. In particular, the courts have acknowledged the difficulties in placing meaningful limits on the discriminatory effect standard of liability. See, *e.g.*, *Resident Advisory Bd. v. Rizzo*, 564 F.2d at 148-149; J.S. App. 23a. While proponents of such a standard have turned to Title VIII as a model, "in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related" (J.S. App. 23a).[21] The

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[21] Courts which adopt the discriminatory effect standard have relied on two aspects of the legislative record. See, *e.g.*, *Arlington Heights II*, 558 F.2d at 1289-1290. The first is the language of 42 U.S.C. 3601, stating that the purpose of Title VIII is "to provide, within constitutional limitations, for fair housing throughout the United States." The second is Senator Mondale's statement that Congress designed the Act to create "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968); see *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). The first statement appears to offer little but a truism and the second, although

hundreds of zoning decisions made by localities every year inevitably involve a mix of factors, some objective, such as traffic or sewage concerns, and some aesthetic, such as density and recreation concerns. Indeed, intangible factors that contribute to the quality of life in a community are legitimate subjects of zoning regulations entitled to judicial deference. See *Village of Belle Terr v. Boraas*, 416 U.S. 1 (1974). The importance of permitting individuals to shape the communities in which they live advises against invalidating zoning decisions enacted without discriminatory intent. And the subjective nature of many of the goals served by zoning renders judicial review of such zoning decisions particularly difficult. The drifting away from the statute's language requiring intentional discrimination has only exacerbated the inherent difficulties of this judicial function.

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stating an admirable goal, does not address the means of achieving it. The argument that the ambitious goals of Title VIII require an expansive reading of the statute to include a discriminatory effect standard hardly surmounts the obstacles posed by the statute's plain language and legislative history.

Congress is currently considering legislation designed to strengthen enforcement of the Fair Housing Act by permitting persons aggrieved by housing discrimination to file administrative claims subject to judicial review. The proposed legislation would also broaden the enforcement authority of the Attorney General and HUD. See H.R. Rep. 100-711, 100th Cong., 2d Sess. (1988).

CONCLUSION

We urge the Court to note probable jurisdiction. However, should the court be disinclined as a matter of its discretionary jurisdiction to reach the rezoning issue, it should summarily affirm the invalidation of Section 198-20 of the Code of the Town of Huntington on which the effects versus intent test issue has not been preserved), making clear at that time that it is declining to reach the other issues presented in the case. See *Davis v. Scherer*, 468 U.S. at 190 n.7.

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June 1988

Supreme Court, U.S.
FILED
SEP 6 2002
CLERK

(6)

No. 01-1269

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS, ET AL., PETITIONERS

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether the court of appeals erred in holding that, in considering a claim against a city for intentional discrimination from the delay arising out of a facially-neutral, citizen-initiated referendum petition, a court may inquire into the intent of the citizens supporting the referendum petition and impute that intent to city officials, who had no discretion under the City's Charter but to delay proceedings in response to the properly filed petition.

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BRIEF FOR THE
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INTEREST OF THE UNITED STATES

This case involves an application of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, to a local government's referendum process. The United States Department of Housing and Urban Development (HUD) has responsibility under the Fair Housing Act to receive, investigate, and attempt to resolve complaints of discrimination through conference, conciliation, and persuasion. 42 U.S.C. 3610. The United States Department of Justice is responsible for enforcing the Act by bringing actions addressing patterns and practices of discriminatory conduct and pursuing individual cases referred by HUD. See 42 U.S.C. 3614. The United States has addressed similar issues concerning Title VIII in this

Court in *Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15 (1988).

STATEMENT

1. Section 804 (Title VIII) of the Civil Rights Act of 1968, 42 U.S.C. 3604, as amended by the Fair Housing Amendments Act of 1988 (Fair Housing Act or FHA), Pub. L. No. 100-430, 102 Stat. 1619, provides, in pertinent part, that it is unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. 3604. Title VIII further provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. 3615.

2. The referendum procedure has long been part of the democratic process in Ohio, particularly at the local level. Since 1912, the Ohio Constitution has expressly reserved the right of the people to enact or change the law, including the state constitution, through referendum. Ohio Const. Art. II, §§ 1-1g; see Richard A. Chesley, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. Cin. L. Rev. 541 (1984). Article II, Section 1f of the Ohio Constitution

expressly reserves that referendum power "to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action."

The Charter of the City of Cuyahoga Falls also expressly reserves to the people the right of referendum. It provides that "[t]he electors shall have the power to approve or reject at the polls *any ordinance* or resolution passed by the [City] Council." App., *infra*, 3a (emphasis added). "Within thirty (30) days after the passage by the Council of such ordinance * * * a petition signed by at least ten percent (10%) of the electors of the City may be filed with the Clerk of the Council, requesting that such ordinance * * * be either repealed or submitted to a vote of the electors." *Ibid.* The Charter further provides that when a referendum petition is filed, "the Clerk shall first ascertain the sufficiency of the petition." *Ibid.* If it is sufficient, "the [City] Council shall * * * reconsider such ordinance." *Ibid.* "If upon such reconsideration the ordinance * * * is not repealed, the Council shall provide for submitting it to a vote of the electors." *Ibid.* Moreover, to further protect the referendum process, the Charter expressly provides that "[n]o * * * ordinance * * * [subject to a properly filed referendum petition] shall go into effect until approved by a majority of those voting thereon." *Ibid.*

2. Buckeye Community Hope Foundation, a not-for-profit corporation, develops affordable housing through the use of low- income housing tax credits. Pet. App. 2a-3a. The Foundation—along with Buckeye Community Three Limited and Cuyahoga Housing Partners, Inc. (collectively, respondents)—sought to build a low-income apartment complex in Cuyahoga Falls, Ohio. *Id.* at 3a, 17a. On June 12, 1995, respondents purchased

land in Cuyahoga Falls that was zoned for apartments. *Ibid.* On February 21, 1996, respondents submitted their site plan to the Cuyahoga Falls Planning Commission. *Ibid.* Several members of the public at that meeting expressed concerns about safety, and one resident stated that there will be a "different class of people living there." *Ibid.* The mayor did not attend this meeting. *Id.* at 4a. The Cuyahoga Falls Planning Director recommended approval of the site plan subject to nine conditions, one of which was that respondents erect a fence on one side of the property. *Ibid.* Respondents agreed to all nine conditions, and the Planning Commission unanimously approved the site plan at its February 21 meeting. *Ibid.*

The site plan was then submitted to the City Council for approval. At the March 4, 1996, City Council meeting, members of the public again voiced their concerns about the project. Pet. App. 4a. For example, one resident expressed concern about the "extra crime and drugs" that come with low-income housing. *Ibid.* At this meeting, the mayor opposed the site plan and referred to an article entitled "Stuck in the Ghetto," which discusses problems associated with Section 8 housing, another type of low-income housing. *Ibid.*

At a second City Council meeting on March 18, 1996, members of the public once again expressed their opposition to the project. Pet. App. 4a-5a. The mayor also expressed his continued opposition. He stated that "the issue was not whether the project was properly zoned, but rather the issue was low-income housing." *Id.* at 5a. He noted that "people who spent a lot of money on their condominiums simply don't want people moving in their neighborhood that are going to be renting for $371." *Ibid.*

Despite the public opposition, the City Council, at its April 1, 1996, meeting, approved the site plan in Ordinance No. 48-1996 by a vote of six to three with two abstentions. Pet. App. 5a. Because the mayor neither signed nor objected to the ordinance, it was deemed "approved" ten days after passage. *Id.* at 7a. Pursuant to Ohio law, the ordinance was to take effect thirty days after the City Council's vote, on May 2, 1996. *Id.* at 8a. In the interim, respondents applied for a building permit. *Id.* at 63a.

In the wake of the City Council's vote, on April 9, 1996, the "Citizens for the Preservation of Voter Rights" held a meeting to discuss "taking the ISSUE OF A 72 UNIT HOUSING DEVELOPMENT ON PLEASANT MEADOW BLVD. to the vote of the people of Cuyahoga Falls in November." Pet. App. 5a. The mayor spoke at this meeting and stated that he supported the referendum effort. *Ibid.* On or about April 29, 1996, a referendum petition, signed by approximately 10% of the electors in Cuyahoga Falls, was submitted to the Clerk of the City Council. *Id.* at 5a, 102a. The Board of Elections, as required by City Code, approved the referendum petition on May 1, 1996. *Id.* at 5a. Under the City Charter, an ordinance challenged by referendum and not repealed "cannot 'go into effect until approved by a majority' of the electorate." *Id.* at 8a.

3. On May 1, 1996, respondents sued petitioners in state court to enjoin the referendum, alleging that the Ohio Constitution does not authorize referenda on administrative actions taken by municipal legislative bodies, and that Ordinance No. 48-1996 was such an administrative act. Pet. App. 5a-6a. The state trial court denied respondents' motion for injunctive relief on May 31, 1996. *Id.* at 6a, 255a-257a. Accordingly, the

City denied respondents' request for a building permit due to the pending referendum on June 26, 1996. *Id.* at 6a. The citizens of Cuyahoga Falls rejected the ordinance when the referendum was placed on the ballot in November 1996. The state court litigation over the propriety of the referendum continued, with the state court of appeals affirming the trial court on December 11, 1996, *id.* at 6a, 246a-254a, and the Ohio Supreme Court affirming on May 6, 1998, *id.* at 6a, 214a-245a.

On July 16, 1998, however, the Ohio Supreme Court, upon a motion for reconsideration, held that the referendum at issue violated the Ohio Constitution because the Ohio Constitution authorizes referendum proceedings only on local legislative actions and the City Council's approval of "the Planning Commission's application of existing zoning regulations to plaintiffs' site plan" in Ordinance No. 48-1996 was "clearly administrative and not legislative." Pet. App. 10a, 202a-206a. Thereafter, the City issued the necessary building permits, and respondents constructed the low-income housing complex. Pet. Br. 4.

4. On July 5, 1996, respondents commenced this action for injunctive relief and damages, alleging that the refusal of city officials to issue the building permits until after the resolution of the referendum process violated the Fair Housing Act and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pet. App. 6a. The district court denied respondents' motion for a preliminary injunction in November 1996.

a. *First Summary Judgment Decision.* On June 20, 1997, District Court Judge Bell held that genuine issues of material fact precluded summary judgment for the City. Pet. App. 57a-58a. With respect to respondents' equal protection and FHA claims based on intentional discrimination, Judge Bell found that statements by project opponents at the public meetings and by the organizers of the referendum drive, when viewed in the light most favorable to respondents, precluded summary judgment. *Id.* at 122a-123a.

b. *Second Summary Judgment Decision.* On April 2, 1998, respondents filed a motion for partial summary judgment with respect to their substantive due process claim. Pet. App. 35a. The City, on June 22, 1998, filed a second summary judgment motion on all claims. *Ibid.* While those motions were pending, Judge Bell retired and the case was reassigned to Judge Polster. *Id.* at 10a. On November 19, 1999, on cross motions for summary judgment, Judge Polster granted summary judgment to the City on all claims. *Id.* at 35a-54a.

With respect to the claims based on intentional discrimination, Judge Polster found not only that respondents failed to raise a material issue of fact concerning whether city officials, as opposed to citizens, acted with discriminatory intent, but also that respondents had produced no evidence that the city officials responsible for certifying the referendum petition and denying the building permit acted with racial animus. Pet. App. 44a-51a. The court also held that *Arthur* v. *City of Toledo*, 782 F.2d 565, 573-574 (6th Cir. 1986), precluded courts from inquiring into the electorate's motives "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated." Pet. App. 46a. Based in part on the statements made by citizens at the public hearings, the court found that there were multiple, race-neutral grounds for the referendum petition, and that an inquiry into the intent of the referendum

supporters was, therefore, not appropriate. *Id.* at 47a-48a.

Judge Polster also held that the City did not violate substantive due process because, *inter alia*, the City's Charter required the City to submit a petition for referendum with the requisite number of signatures to the Board of Elections. Pet. App. 41a-45a.

c. *Court Of Appeals' Decision.* The Sixth Circuit reversed Judge Polster's order, finding genuine issues of material fact. Pet. App. 2a, 33a. With respect to intentional discrimination under the Equal Protection Clause and the FHA, the court held that Judge Polster erred by failing to determine if there was evidence that Cuyahoga Falls residents were motivated in part by racial bias when they organized and submitted the referendum petition. By focusing only on the motives of city officials, the court of appeals held, the district court's "analysis begs the question of whether the public opposition to the housing project was animated by racial bias and whether city officials improperly gave effect to that racial bias by allowing the fate of the project to be decided by referendum." *Id.* at 12a. The panel also criticized the Sixth Circuit's earlier statement in *Arthur*, 782 F.2d at 574, that courts may not inquire into the electorate's motives behind a facially-neutral referendum in an equal protection challenge, Pet. App. 17a-19a.

Applying the multi-factored test from *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977), for determining whether official action was motivated by discriminatory intent, the court of appeals found that statements made by referendum supporters and project opponents at the public hearings, and the circumstances of the opposition to the ordinance (*e.g.*, that this was the first

time the City had submitted a site plan ordinance to a referendum), "raise[] a genuine issue of material fact as to whether this deviation from the procedural norm was predicated on racial bias, especially in light of the disproportionate impact the decision had on blacks." Pet. App. 15a-17a. The court of appeals also reversed the district court's holding that the City's actions were not arbitrary and capricious because it was simply following its own laws, even though the City's actions were affirmed by the Ohio Supreme Court in its first consideration of the issue. *Id.* at 33a.

SUMMARY OF ARGUMENT

This case implicates both the First Amendment rights of citizens to criticize and petition the government and constitutional and statutory prohibitions on discrimination in housing. The court of appeals held that federal courts may analyze the statements of citizens who supported a referendum petition to determine the intent of city officials, even though the officials' actions followed automatically from the filing of the citizen petition. Such an inquiry into the motives of those who supported a referendum threatens to chill important First Amendment activities. Although the courts need to strike a careful balance between vital interests in petitioning the government and fair housing, the balance struck by the court below placed insufficient weight on preserving the right to petition.

To protect the core First Amendment rights inherent in the referendum process, this Court should make clear that government officials cannot be held liable under the Fourteenth Amendment or the Fair Housing Act for the procedural ramifications of a facially neutral referendum petition, absent evidence that the petition was a sham for unlawful discrimination. Moreover,

regardless of the standard applied, the court of appeals erred in finding evidence of intentional discrimination on the part of petitioners, who had no discretion under the City's Charter but to give effect to a neutral, properly filed, citizen-initiated referendum petition.[1]

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING EVIDENCE OF INTENTIONAL DISCRIMINATION

A. Courts Should Protect The Actions Of Local Officials In Giving Effect To A Facially-Neutral, Citizen-Initiated Referendum Petition

In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court set forth the general test for determining whether official action was motivated by discriminatory intent. Under that test, federal courts examine four non-exclusive factors probative of discriminatory purpose: (1) the disproportional racial impact of the official action; (2) the historical background of the decision, particularly where it reveals a series of official actions taken for invidious purposes; (3) the specific

[1] The Court also granted certiorari on the question whether a disparate-impact claim may be maintained under the Fair Housing Act. Although the court of appeals addressed the issue, that question does not appear to be properly presented in this case. Respondents' complaint did not raise a separate disparate-impact claim, and counsel for respondents has informed us that respondents do not view their complaint as addressing such a claim and do not intend to advance a disparate-impact theory before this Court. In any event, given that respondents challenge only the actions of city officials with regard to a single permit application, and do not challenge any general policy or practice on the part of the City or its officials, any attempt to apply disparate-impact analysis to this case would be inherently incoherent. Accordingly, this brief does not address the disparate-impact question.

sequence of events leading up to the challenged decision, including departures from normal procedures and from the substantive norms usually applied; and (4) the legislative or administrative history, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. *Id.* at 266-268.

Here, respondents challenge the delay resulting from the nondiscretionary actions of city officials to comply with the City Charter's longstanding provisions allowing for citizen-initiated referenda to review *any* ordinance passed by the City Council. Under such circumstances, the "sensitive inquiry" into discriminatory intent envisioned by this Court in *Arlington Heights* requires particular sensitivity to the important First Amendment rights implicated in the referendum process. As in other contexts involving motive-based challenges to actions protected by the First Amendment, courts should only find such actions unlawful if the plaintiff can establish that the protected First Amendment activities, here the referendum petition, was a sham to disguise unlawful discrimination. Cf. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 670 (1965); *BE&K Constr. Co.* v. *NLRB*, 122 S. Ct. 2390, 2395-2396 (2002) (applying "sham litigation" standard to NLRA cases).

1. The Referendum Process Involves The Exercise Of Important First Amendment Rights

The First Amendment manifestly protects the actions of city officials taken to give effect to a facially-neutral, citizen-initiated referendum petition. This Court has made clear that the referendum is "a means

for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies," *City of Eastlake* v. *Forest City Enter., Inc.*, 426 U.S. 668, 673 (1976), and that the exercise of that power is protected by the First Amendment, see *Meyer* v. *Grant*, 486 U.S. 414, 420 (1988).

In *James* v. *Valtierra*, 402 U.S. 137 (1971), for example, this Court, without inquiring into the intent of the proponents, upheld an amendment to the California constitution that required all low-rent public housing projects to be approved by a majority of the public. *Id.* at 143. In so holding, this Court emphasized that the referendum process fosters "democratic decisionmaking" and gives citizens "a voice in decisions that will affect the future development of their own community." *Ibid.* The Court found that the amendment did not rest on "distinctions based on race" because it "require[d] referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority." *Id.* at 141. The Court concluded that it could invalidate this race-neutral amendment only by extending its holding in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), that a race-based city charter amendment was unconstitutional, and the Court was unwilling to take this step absent proof that the amendment created a racial classification. Such facially neutral referenda, the Court concluded, "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *Valtierra*, 402 U.S. at 141.

Like the amendment in *Valtierra*, the referendum petition here was facially neutral and did not create a racial classification. Moreover, Cuyahoga Falls's referendum procedure is even more neutral than the one upheld in *Valtierra*. Whereas California's referendum

scheme *required* that *all low-income housing projects* be submitted to a referendum, the City Charter of Cuyahoga Falls merely provides that (1) citizens *may* initiate a referendum to review *any ordinance* of the City Council by submitting a petition signed by 10% of the electorate, and (2) city officials must stay any action on the ordinance pending a vote on the referendum. App., *infra*, 3a.

The courts below found, and respondents appear to concede, that both the City's referendum procedures and the particular referendum petition at issue here were facially neutral. In fact, in the present action, respondents do not directly challenge the referendum itself. Nor do they allege that the referendum petition lacked the requisite number of signatures. Rather, they have filed suit against the City and its officials for delaying the issuance of building permits. But that delay followed as a matter of course from the filing of the referendum petition. Accordingly, respondents' real complaint is not with the city officials for entering an "automatic stay," but with the citizens for filing the referendum petition, and the citizens' actions clearly implicate the First Amendment right to petition.

2. Respondents Should Be Required To Demonstrate That The Referendum Petition Was A Sham For Unlawful Discrimination

In light of the potential for chilling First Amendment rights to petition, the actions of city officials in giving effect to the properly filed referendum petition should be considered unlawful, if at all, only upon a showing that, although the petition was facially neutral, the actions of the city officials were nonetheless a sham designed to further unlawful discrimination. Such a standard would be consistent with that employed by

this Court in other contexts to avoid drawing a federal statutory scheme into unnecessary conflict with First Amendment rights.

Most notably, in the antitrust context this Court has held that "the Sherman Act does not prohibit * * * persons from associating * * * in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr*, 365 U.S. at 136. The Court later made clear that this antitrust immunity "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U.S. at 670; see *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511 (1972) (extending *Noerr*-Pennington immunity principles to situations where groups "use * * * courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors"). This immunity, however, does not extend to "illegal and reprehensible practice[s] which may corrupt the * * * judicial process[]," *California Motor Transp.*, 404 U.S. at 513, or to lobbying "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144. As this Court recently explained, "[t]his line of cases thus establishes that while genuine petitioning is immune from antitrust liability, sham petitioning is not." *BE&K Constr. Co.*, 122 S. Ct. at 2396.

Because of the First Amendment rights involved, the plaintiff's burden of proving a "sham" is a heavy one. In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), the

Court adopted a two-part definition of sham antitrust litigation: first, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the litigant's subjective motivation must "conceal[] an attempt to interfere *directly* with the business relationships of a competitor * * * through the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* at 60-61 (internal quotation marks omitted; emphasis in original); see *BE&K Constr. Co.*, 122 S. Ct. at 2396 ("For a suit to violate the antitrust laws, then, it must be a sham *both* objectively and subjectively.").

More generally, this "sham" standard reflects this Court's recognition that the First Amendment often requires that protected activities be given some "breathing space." See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341-342 (1974) (noting the need to protect some falsehoods to ensure that "the freedoms of speech and press [receive] that 'breathing space' essential to their fruitful exercise") (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). As the Court recently explained, another "example of such 'breathing space' protection is the requirement that a public official seeking compensatory damages for defamation prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity." *BE&K Constr. Co.*, 122 S. Ct. at 2399 (citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280, 285 (1964)); see 122 S. Ct. at 2399 ("It is at least consistent with these 'breathing space' principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own.").

In light of the vital First Amendment rights involved in the referendum process, this Court should apply a similar standard to this case. The Fair Housing Act and, *a fortiori*, the Fourteenth Amendment safeguard critically important rights. But when a challenge is brought to a facially neutral referendum and the actions taken by city officials as a direct, and for the most part automatic, response to the filing of a petition, the resulting legal analysis should take account of the important First Amendment interests at stake. The resulting test would not immunize the referendum process from scrutiny, but it would force a party challenging a facially neutral referendum and referendum process to meet a demanding standard by showing that actions that purport to be protected First Amendment conduct are, in fact, a sham.

Applying such a heightened standard here would preclude any finding of liability on the part of the City or its officials. Not only is it undisputed that the referendum petition was facially race-neutral, Pet. App. 18a-19a, but it is also clear that there were many non-racially based concerns that led to the citizen-initiated referendum, as each of the courts below recognized. *Ibid.* (court of appeals: "It is undisputed that the referendum in this case was facially neutral and that there were other hypothetical justifications for the referendum apart from racial bias."); *id.* at 47a-48a (Judge Polster: "The Court now finds that racial discrimination, if present, was not the only possible explanation for the 1996 referendum. It is quite possible that the citizens of Cuyahoga Falls may have demanded the referendum for, *inter alia*, safety or economic reasons. This is in fact borne out by the testimony of referendum proponents."); *id.* at 120a-121a n.32 (Judge Bell: "[R]acial bias [was not] 'the only possible rationale' for

the citizen's petition * * *. Other possible rationales * * * include, for example, concern about the effect of low-income housing on property values of surrounding properties, or worries over increased demand on public services or schools.").

Accordingly, presented as they were with a neutral, properly filed, objectively reasonable referendum petition, city officials did the only thing they could do consistent with the City Charter (and, indeed, the First Amendment): they placed the referendum on the ballot and delayed issuing building permits until the referendum vote occurred. Indeed, the only decision the city officials made that involved even a modicum of discretion was the decision to accept the petition as "sufficient" and properly filed. See App., *infra*, 3a ("When such petition is filed, the Clerk shall first ascertain the sufficiency of the petition."). Even there, however, it is undisputed that the referendum petition contained the necessary signatures, was timely, and otherwise fully complied with the requirements of the City Charter. The other decisions—including the decision to delay issuance of the building permits which is at the heart of respondents' complaint—followed as a matter of course. And although the Ohio Supreme Court ultimately found the referendum, and the City Charter's longstanding provision subjecting *all ordinances* of the City Council to the referendum process, improper on a motion for reconsideration, all three courts that reviewed the petition before the November, 1996 referendum—including the Ohio Supreme Court itself—concluded that the petition and the City's referendum process were lawful. See Pet. App. 214a-245a. As the district court below properly concluded, "[t]he fact that the highest state court issued contradictory 4-3 rulings on [the legality of the petition] in less than three months shows

just how close this question of state law was. Surely, the Cuyahoga Falls Clerk (or any other city official) cannot be charged with any greater knowledge of the law than the state courts of Ohio." *Id.* at 43a. Under these circumstances, the decision to accept the petition for filing cannot be attributed to a racial motive.[2]

The Sixth Circuit nonetheless held that "if there is evidence that residents of Cuyahoga Falls were motivated, in part, by racial bias, the City can not give effect to that bias simply because its City Charter provides for referendum." Pet. App. 13a. That standard appears to contemplate an obligation of local officials to consider the motivations of citizens in signing and filing a referendum petition and to refuse even to accept a facially neutral and otherwise proper petition if its sponsors "were motivated, in part, by racial bias." That approach would seriously compromise the right of citizens to petition their government, as well as to vote on facially race-neutral measures that affect their communities. See *Washington* v. *Davis*, 426 U.S. 229, 253 (1976) ("It is unrealistic * * * to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the

[2] Indeed, given the essentially ministerial acts of the city officials in accepting the petition for filing and automatically staying the effect of the ordinance approving respondent's site plan, the actions of the city officials were analogous to those of a court receiving pleadings later alleged to be shams. In the latter context, even if the pleadings are ultimately proven to be shams, the petitioning party, not the court, is subject to liability. By analogy, it may be that the only parties potentially liable for filing a sham petition here should be the petition supporters, rather than the city officials. In any event, the city officials certainly cannot be liable where, as here, the underlying petition cannot be shown to be a sham.

decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.").

The Sixth Circuit's approach would place local officials in an untenable position and would chill core First Amendment activities and values. Precisely because the referendum petition was facially neutral and not obviously the product of racial animus, the Sixth Circuit test would force city officials to attempt to divine whether some percentage of the thousands of citizens who supported the referendum had improper motivations. At a minimum, city officials would presumably need to question those who signed the petition. Such official cross-examination, however, self-evidently would chill voters from exercising their political rights to propose or support petitions seeking referenda and to otherwise engage in the political process without fear that their thought processes will be open to public scrutiny.

The more limited inquiry into whether the referendum petition was, both objectively and subjectively, a sham greatly reduces those First Amendment concerns. It does so, moreover, without creating a significant loophole in the enforcement of the Fourteenth Amendment or the Fair Housing Act. As an initial matter, the possibility that discriminatory motives may be exercised by some voters is subject to review during the referendum process itself. Voters on one side of the issue can always seek to convince other voters that a vote for or against a particular race-neutral question may in fact implement racial motivations. While the political speech during the referendum process will not root out all discriminatory motives, it bears emphasis that an unfettered debate, protected by the First Amendment, itself will help expose improper motives.

Moreover, a referendum, like any other law, may be impermissible if it is facially race-based or creates a racial classification. See *Hunter*, 393 U.S. at 390-393. Thus, in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457, 465 (1982), this Court held that a statewide referendum initiative that prohibited school districts from reassigning and busing students *only for desegregation purposes* was based on racial bias and violated the Equal Protection Clause. *Id.* at 462-463. Although the Court observed that the referendum "nowhere mentions 'race' or 'integration'" and therefore, at least superficially, the referendum was "facial[ly] neutral[]," the Court concluded that the text of the referendum left "little doubt that the initiative was effectively drawn for racial purposes" and it plainly resulted in a racial classification. *Id.* at 471. Thus, because "*the text of the initiative* was carefully tailored to interfere only with desegregative busing" and the proponents of the initiative candidly acknowledge that its purpose was limited solely to prohibiting busing for desegregation purposes, the Court held that "[i]t is beyond reasonable dispute * * * that the initiative was enacted because of, not merely in spite of, its adverse effects upon busing for integration." *Ibid.* (emphasis added; citation and internal quotation marks omitted). In contrast, no such discriminatory purpose appears on the face of the referendum petition in this case, or on the City's plainly neutral referendum procedure. Cf. *Southern Alameda Spanish Speaking Org.* v. *City of Union City*, 424 F.2d 291, 295 (9th Cir. 1970) (stating that "question of motivation for the referendum (apart from a consideration of its effect)" is not "an appropriate one for judicial inquiry"); *Ranjel* v. *City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970).

In addition, when a referendum is advisory only, and municipal officials must exercise their discretion when deciding whether and how to implement the results of the referendum, the motives of those officials are fully subject to review under the tests this Court set forth in *Arlington Heights*. See *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1066-1067 (4th Cir. 1982); *United States* v. *City of Birmingham*, 727 F.2d 560, 564-565 (6th Cir.), cert. denied, 469 U.S. 821 (1984).

B. Under Any Conceivable Standard, The Court Of Appeals Erred In Finding Evidence Of Intentional Discrimination

Regardless of whether the Court adopts a heightened, First Amendment standard in this context or applies the general *Arlington Heights* factors, the court of appeals erred in finding evidence of discriminatory intent on the part of city officials. The City's Planning Commission, City Council, and Mayor Robart (by not exercising his veto power) *approved* respondents' site plan despite public opposition to the proposed housing complex. The subsequent actions by city officials to delay issuance of the building permits pending resolution of the referendum were *required* by the City Charter. As noted, the only decision adverse to respondents that involved even a modicum of discretion was the decision to accept the petition for filing. However, the Charter makes clear that the Clerk of the City Council *must* accept the referendum petition once he determines its "sufficiency," and it is undisputed that the petition was timely, contained the requisite number of signatures, and otherwise complied fully with the City Charter's provisions governing referenda. Indeed, in light of the varying judicial opinions on the propriety of the referendum, the city officials cannot be faulted

(let alone, assigned a discriminatory intent) for accepting the petition. Accordingly, respondents' real complaint is not with the city officials (whom they named as defendants), but with the *citizens'* action of petitioning the government—in the form of the referendum petition.

The court of appeals, however, failed to account for the fact that the building-permit delay followed as a matter of course from the filing of the petition. It therefore erred in finding evidence of discriminatory intent *on the part of city officials*, even under the general *Arlington Heights* standard. For example, in concluding that there was sufficient evidence that city officials had departed from normal procedures to preclude summary judgment under the *Arlington Heights* test, the court of appeals relied solely on the fact that this was the first time the referendum process had been used to halt a proposed housing development in Cuyahoga Falls. Pet. App. 14a-15a. But the fact that this was the first time residents of Cuyahoga Falls were sufficiently concerned about a housing project to initiate the City's longstanding referendum procedures does not mean that city officials departed from normal procedures in handling the permit requests. To the contrary, it is undisputed that the City's referendum procedures, including the requirement that city officials stay any action on an ordinance once a properly filed referendum petition is received, were in place long before respondents submitted their site plan for approval and had been employed in response to petitions filed on other subjects. And it appears to be undisputed in this case that city officials followed those preexisting referendum procedures to the letter. See *id.* at 48a ("The Court finds that plaintiffs have provided absolutely no evidence that the Clerk or City Engineer had

any racial animus in carrying out their ministerial functions.").

The court of appeals also failed to recognize that the "referendum process" was not begun by the City or any of its officials, but rather by 10% of electors signing a petition seeking to have a referendum on the issue. Thus, the court of appeals erred in comparing this case to *Smith*, 682 F.2d at 1066-1067, and *City of Birmingham*, 727 F.2d at 564-565. In *Smith*, town officials were found to have violated the FHA by halting the construction of public housing after conducting, *for the first time*, an opinion poll of the residents regarding the proposed development. Similarly, in *City of Birmingham*, the court held that the City's unusual "decision to conduct an advisory referendum" concerning a proposed low-income housing project departed from the City's normal procedures and, taken together with other departures from normal procedures, was probative of discriminatory intent.

Unlike the court of appeals below, however, the courts in those cases were not attempting to determine the intent of the voters or to use that intent as a proxy for the intent of city officials. Instead, the courts were simply considering the context of the legislators' decision to ascertain whether the *legislators'* actions were motivated by discriminatory animus.

To the extent that Mayor Robart attended the organizational meeting for the referendum on April 9, 1996, his participation does not constitute action by the City, or attributable to the City, to solicit the filing of the referendum petition. None of the courts below found evidence that the referendum petition was initiated by anyone other than the voters of Cuyahoga Falls. See Pet. App. 128a-129a ("A review of the evidence cited by Plaintiffs reveals that there is no proof

that the Mayor contributed to the referendum process aside from lending support by answering some procedural questions. * * * The facts in evidence do *not* sustain Plaintiffs' unsupported assertions that the Mayor organized the petition drive in question, that he secured meeting places for the citizen group opposed to the project, that he certified the petition, or that he submitted the referendum question to the Board of Elections."); *id.* at 44a ("Judge Bell previously found that the evidence did not support [respondents'] assertions that the Mayor organized the petition drive, secured meeting places for the citizen group opposed to the project, certified the petition, or submitted the referendum question to the Board of Elections. Plaintiffs have provided no additional evidence otherwise."). Indeed, the mayor (by not exercising his veto power) and City Council, *approved* the site plan despite the expressed public opposition to the project at the three City Council hearings.

In addition, because respondents are challenging only the actions of city officials in giving effect to the facially neutral referendum petition, the court of appeals erred in inquiring into the motivations of the referendum proponents and imputing that motive onto city officials. This Court has held that courts may inquire into contemporary statements made by legislators to determine if racial discrimination is one basis for the challenged governmental action. See *Arlington Heights*, 429 U.S. at 268. But this Court has never held that courts may consider the statements of the proponents of a facially-neutral referendum, as well as those who supported or signed the petition, much less impute those statements to city officials who had no discretion but to give effect to petition once it was filed. Cf. *Arthur* v. *City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) ("[A]bsent a

referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context."). For the reasons set forth above, that inquiry improperly and unnecessarily infringes on the rights of voters to petition their government and to participate fully in the political process.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX

42 U.S.C. 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the

neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

* * * * *

Ohio Const., Art. II: Legislative.

Section 1. *In whom power vested.* The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

* * * * *

Section 1f. *Power of municipalities.* The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Art. IX, § 2, Charter of the City of Cuyahoga Falls, OH.

The electors shall have the power to approve or reject at the polls any ordinance or resolution passed by the Council, except as hereinafter provided. Only electors of the City may circulate referendum petitions. Within thirty (30) days after the passage by the Council of such ordinance or resolution or its repassage over the Mayor's veto, whichever is later, a petition signed by at least ten percent (10%) of the electors of the City may be filed with the Clerk of the Council, requesting that such ordinance or resolution be either repealed or submitted to a vote of the electors. If said petition is signed by twenty percent (20%) or more of such electors, the date of the election may be fixed therein, not less than ninety (90) days from the time of filing thereof. When such petition is filed, the Clerk shall first ascertain the sufficiency of the petition, and if found sufficient, the Council shall thereupon, within thirty (30) days of the filing of such petition, reconsider such ordinance or resolution. If upon such reconsideration the ordinance or resolution is not repealed, the Council shall provide for submitting it to a vote of the electors on the date so fixed, or, if not so fixed, at the first general election in any year occurring more than ninety (90) days from the filing of such petition. No such ordinance or resolution shall go into effect until approved by a majority of those voting thereon, in which event such ordinance or resolution shall go into effect on the fifth day after the day on which the Board of Elections certifies the official vote thereon. When the Council by general law or under provisions of general ordinance is required to pass more than one ordinance or resolution necessary to make and pay for any public improvement, the referendum provision

shall apply only to the first ordinance or resolution required to be passed and not to any subsequent ordinances or resolutions relating thereto.

In addition, ordinances providing for an annual tax levy or for improvements petitioned for by the owners of a majority of the foot front of the property benefitted and to be specially assessed therefor, and appropriation ordinances limited to the subject of appropriations shall not be subject to referendum, but, except as herein provided, all other ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, including emergency ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, shall be subject to referendum, except that such emergency ordinances and resolutions shall go into effect at the time indicated therein. If, when submitted to a vote of the electors, an emergency measure be not approved by a majority of those voting thereon, it shall be considered repealed as regards any further action thereunder; but such measure shall be deemed sufficient authority for payment, in accordance therewith, of any expense incurred previous to the referendum vote thereon.

Ordinances or resolutions submitted to the Council by initiative petition and passed by the Council either with or without change, but not submitted to a vote of the electors shall be subject to referendum in the same manner as other ordinances or resolutions.

Supreme Court, U.S.
FILED
AUG 26 2002
CLERK

No. 01-1269

In the

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, et al.,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may the court inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal organization?

2. In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of filing of a facially neutral and judicially upheld referendum petition?

3. Does the Due Process Clause of the Constitution require a municipal corporation to issue building permits when the underlying conditions for issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the Center for Equal Opportunity, respectfully submit this brief amicus curiae in support of neither party. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF considers this case to be significant in that it concerns the scope of disparate impact, a doctrine that is often counterproductive to the public interest. PLF has participated in numerous cases involving discrimination on the basis of race including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). PLF is also interested in the substantive due process issue. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

The Center for Equal Opportunity (CEO) is a Virginia nonprofit corporation. CEO's main purpose is to study issues concerning race and ethnicity. CEO has participated actively in a wide variety of civil rights cases including: *Alexander v.*

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[1] Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Sandoval, 532 U.S. 275 (2001); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). CEO is participating only in Part I of this brief.

STATEMENT OF THE CASE

The facts of the case are set forth in *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001). Buckeye Community Hope Foundation (Buckeye) purchased real property in the City of Cuyahoga Falls (City) for the purpose of developing a low-income housing complex. Buckeye submitted a "site plan" for the project which was approved by the City planning commission and City Council over the objections of the mayor and some members of the public. *Id.* at 630-31.

City residents filed a referendum petition seeking a vote on the city council's approval of the site plan. The Ohio Supreme Court ultimately ruled that the referendum violated the state constitution. *Id.* at 633. Buckeye also filed an action in federal court alleging violations of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, 42 U.S.C. §§ 1981 and 1982, the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, per 42 U.S.C. § 1983. *Id.* at 632. The district court eventually granted the City's motions for summary judgment on all claims. *Id.* The Sixth Circuit reversed, holding that there were genuine issues of material fact as to the equal protection claim, *id.* at 639, the Fair Housing Act claim, *id.* at 641, and the substantive due process claim, *id.* at 644. This Court granted certiorari. Amici will address only issues of the applicability of disparate impact analysis to the Fair Housing Act and the standards for determining substantive due process violations in land use cases.

SUMMARY OF ARGUMENT

The legislative history of the Fair Housing Act, as expressed by its proponents in Congress, shows that the Act

was intended to apply solely to intentional discrimination, not to acts having a disparate impact on protected classes. Disparate impact doctrine developed haphazardly in the courts with the main impetus from the federal bureaucracy. The courts mistakenly deferred to the regulatory extension of civil rights statutes from the intent standard set by Congress to an effects standard promoted by the regulatory agencies. Congress has reluctantly acceded to the courts' and agencies' adoption of disparate impact theory but has frequently acted to limit its application. This Court has also limited disparate impact by holding it inapplicable in Equal Protection cases and declining to extend it to statutes such as the Age Discrimination in Employment Act, the Equal Pay Act, and 42 U.S.C. § 1981. The Court has shown particular concern that disparate impact doctrine would lead to the adoption of quotas and preferential treatment, contrary to the will of Congress.

The federal circuits disagree on what sort of property interest is entitled to substantive due process protection in the land use context. A number of circuit courts, including the court below, require that a landowner demonstrate a "vested right" or "entitlement" to a particular use of property. That approach—borrowed from procedural due process cases claiming a property interest in continued public benefits—has no place in land use cases involving arbitrary government action that interferes with the right to use land. The Constitution and this Court's precedents require that the ownership of land implicates a property right protected by due process.

ARGUMENT

I

DISPARATE IMPACT ANALYSIS IS NOT APPLICABLE TO THE FAIR HOUSING ACT

A. The Plain Language of the Fair Housing Act Limits Its Applicability to Intentional Discrimination

The Fair Housing Act (FHA), 42 U.S.C. § 3601, *et seq.*, declares that it is unlawful to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The wording of the FHA focuses on whether people of different races are treated differently *because of* their race or other stated grounds. This language plainly prohibits only intentional discrimination. However, the Sixth Circuit went further and held:

> Even if plaintiffs fail to prove that defendants intended to discriminate on the basis of race, they also have a valid claim under the FHA on the theory that defendants' actions had a disparate impact based on race.

Buckeye, 263 F.3d at 640.

The court held that "at least under certain circumstances, a violation of the Fair Housing Act can be established by a showing of discriminatory effect without a showing of discriminatory intent." *Id.* Thus, if a municipal action disproportionately impacts members of a minority group it violates the FHA, even if there was no intent to discriminate.

This Court specifically reserved the question whether disparate impact analysis applies to the FHA in *Town of Huntington v. Huntington Branch, National Association for the Advancement of Colored People*, 488 U.S. 15, 18 (1988). The

legislative history of the Act and public policy strongly support the argument that it does not.

B. Congress Intended the Fair Housing Act to Ban Intentional Discrimination, Not Facially Neutral Laws That Merely Have a Disproportionate Effect

The legislative history of the FHA shows that Congress intended the Act to apply only to intentional discrimination. Because the FHA was offered as a floor amendment in the Senate there are no committee reports. The legislative history thus consists of statements on the floor of the Senate and House. Significantly, neither the supporters nor the opponents suggested that the Act would ban as racially discriminatory local land use regulation that had a disproportionate effect on minorities. This would have had the extraordinary impact of invalidating innumerable local zoning regulations that, without any intent to discriminate, impose lot size or type of unit restrictions (*e.g.*, zoning restricting development to single family dwellings) on residences. Since such restrictions impose economic means tests on residents and certain minorities are disproportionately less able to afford single family residences, such zoning has a disparate impact on members of those minority groups. Instead, the legislative history shows that Congress was concerned with prohibiting intentional refusals to sell or rent housing because of the race of the renter or buyer and intended that financial ability should remain the single most important factor in such transactions.

Senator Mondale, a leading sponsor of the FHA, stated: "The bill simply reaches the point where there is an offering to the public and the prospective seller refused to sell to someone solely on the basis of race." 114 Cong. Rec. 4974 (Mar. 4, 1968). Senator Hart concurred: "When you go to a property that is publicly offered, let us not run the litmus test of how I spell my name, or where I went to church . . . or what color God gave me." *Id.* at 4976. Senator Mondale stressed the limits on

the bill's reach: "The bill permits an owner to do everything that he could do anyhow with his property—insist upon the highest price, give it to his brother or wife, sell it to his best friend, do everything he could ever do with property, except refuse to sell it to a person solely on the basis of his color or his religion. That is all it does. It does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American because of his color, and that is all." *Id.* at 5643 (Mar. 7, 1968). Congressman Steiger declared: "You cannot, because of one reason—race—refuse to sell or rent property. All of the legitimate criteria which a homeowner uses to judge the prospective buyer remain unimpaired." Senator Brooke, another leading cosponsor, stated:

> I believe that all we are saying in this amendment is that we are giving the opportunity for people to live where they want to live and where they can live . . . . A person can sell his property to anyone he chooses, as long as it is by personal choice and not because of motivations of discrimination.

Id. at 2283 (Feb. 6, 1968). Senator Tydings also emphasized that the issue was intentional discrimination: "Just a year ago, in this Chamber . . . I made the observation that—purposeful exclusion from residential neighborhoods, particularly on grounds of race, is the rule rather than the exception in many parts of our country." *Id.* at 2528 (Feb. 7, 1968). He later noted that "the deliberate exclusion from residential neighborhoods on grounds of race—and all the problems that go with it—are still with us today . . . ." *Id.* at 2530.

It is perhaps ironic that this case arises in the context of opposition to low-income housing as an alleged proxy for race discrimination. The legislative history shows that members of Congress repeatedly stressed that the bill was designed to make financial ability, rather than race, the principal qualification for purchasing or renting housing. Senator Mondale noted: "We

had several witnesses before our subcommittee who were Negro, who testified that they had the financial ability to buy decent housing in all-white neighborhoods, but despite repeated good faith attempts, were unable to do so." *Id.* at 2277 (Feb. 6, 1968). Senator Hatfield emphasized: "The point is that where discrimination exists at all, where any man in any part of this country . . . is denied the right to buy a home within a community according to his economic ability, wherever he might please, merely because his skin is of a different color, there is a denial of a right that belongs to all Americans, and therefore this should be corrected." *Id.* at 3129 (Feb. 15, 1968). Senator Scott agreed: "Most persons in this country can rent or buy the dwelling of their choice if they have the money or credit to qualify. But others, even if they have unlimited funds and impeccable credit, often are denied access to decent housing simply because of the color of their skin." *Id.* at 3252 (Feb. 16, 1968). Congressman McGregor added: "How bitter it must be to find that although your bank balance is ample, your credit rating is good, your character above reproach, you may not improve your family's housing because your skin is not white." *Id.* at 9564 (Apr. 10, 1968).

The intent of the bill was summed up by Senator Mondale: "I emphasize that the basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice." *Id.* at 3421 (Feb. 20, 1968). He emphasized: "We readily admit that fair housing by itself will not move a single Negro into the suburbs—the laws of economics will determine that." *Id.* at 3422. This legislative history shows that Congress' purpose in adopting the FHA was to prohibit intentional discrimination. The members' statements refute the suggestion that the FHA was further intended to outlaw restrictions based on economic means such as the low-income housing here at issue.

The reality is that local land use decisions involve a mix of factors. Some factors are objective such as sewage, traffic, water supply, and school impacts. Others are esthetic, such as preserving open space and limiting housing density. This Court recognized these intangible quality of life factors as legitimate subjects of local land use regulation that are entitled to judicial deference in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Indeed, Senator Mondale made it clear that the FHA was not even intended to apply to land use regulation. In the hearings recorded in *Fair Housing Act of 1967: Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. 22-23 (1967), Senator Mondale stated that the bill was "designed to deal exclusively with the refusal to sell or rent for racial reasons, and it does not apply to the existence of other reasons or [sic] does not apply to zoning requirements, ordinances, and the rest." *Id.*

If it had wished to create an effects standard for the FHA, Congress was well aware of how to do so. In Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, Congress mandated that covered jurisdictions seek preclearance of any voting change and demonstrate that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." This language shows that Congress was aware that race-neutral practices could produce racial effects and that it knew how to prohibit such practices when it intended to do so. It did not do so here. When the statute was amended in 1988, Congress made no change in the wording of the operative parts of the statute and President Reagan in signing those amendments declared that the statute "speaks only to intentional discrimination." Remarks on Signing the Fair Housing Act Amendment Act of 1988, 24 Weekly Comp. Pres. Doc. 1140-41 (Sept. 13, 1988).

C. Extending Disparate Impact Analysis to the Fair Housing Act Would Be Contrary to Public Policy

1. Disparate Impact Analysis Developed Haphazardly at the Impetus of the Federal Bureaucracy

The doctrine of "disparate impact" saw its initial judicial application in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* held that an employer's requirement that job applicants have completed high school and pass a general intelligence test discriminated against blacks in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin, because it excluded a higher proportion of blacks than whites and was not demonstrably related to actual ability to do the work. *Griggs*, 401 U.S. at 431-32. The ruling in *Griggs* was clearly influenced by the fact that the employer had a history of overt racial discrimination which had apparently ceased after the enactment of the Civil Rights Act of 1964, although the employer continued to follow policies that had a markedly disproportionate effect on blacks. *Id.* at 428-29.

The disparate impact doctrine was extended to Title VI in *Lau v. Nichols*, 414 U.S. 563 (1974). There, non-English-speaking students of Chinese ancestry sued San Francisco school officials alleging that the school district's failure to provide equal educational opportunities violated the Fourteenth Amendment and Title VI. *Id.* at 564. The Court did not reach the Equal Protection Clause argument but instead relied solely on Section 601 of Title VI. *Id.* Although the Court did not use the term "disparate impact," it cited Department of Health, Education & Welfare (HEW) regulations[2] issued pursuant to Section 602 that barred acts that have the effect of

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[2] The court also took note of HEW guidelines that required federally funded school districts to rectify students' language deficiencies. *Id.* at 566-67.

discrimination, even though there is no purposeful design to discriminate. *Id.* at 568.

The concurring opinion of Justice Stewart, joined by the Chief Justice and Justice Blackmun, raised a fundamental issue: "The critical question is . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601." *Id.* at 571 (footnote omitted). The concurrence noted that the validity of a regulation promulgated under a general authorization provision such as Section 602 of Title VI "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Id.* (citations omitted).

In *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), a majority of the Court's members held that proof of purposeful discrimination is a necessary element of a valid claim under Title VI itself. Black and Hispanic members of the city police department had challenged the city's "last-hired, first-fired" policy as having a disparate impact on the basis of race. In a badly splintered decision, the Court affirmed the Second Circuit's denial of relief under Title VI. In their concurring opinion, *id.* at 610-11, Justices Powell, Rehnquist, and Chief Justice Burger observed that in *Regents of the University of California v. Bakke*, 438 U.S. 265, Justice Powell held that Title VI proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment. *Id.* at 287. Justices Brennan, White, Marshall, and Blackmun reached the same conclusion in *Bakke*: "'Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's.'" *Id.* at 352. Since the Constitution requires proof of discriminatory intent, Justices Powell, Burger, and Rehnquist held that *Bakke* necessarily required rejection of the decision in *Lau* that discriminatory impact suffices to establish liability under Title VI. *Guardians*, 463 U.S. at 610-11.

Justices Brennan, White, Marshall, and Blackmun concurred: "'In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies.'" *Id.* at 639. Justices Stevens, Brennan, and Blackmun further concurred, noting that the interpretation of Title VI adopted by a majority in *Bakke* was confirmed in two subsequent opinions of the court. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), distinguished Title VII from Title VI on the basis that Title VII "'was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.'" *Id.* at 207 n.6. And in *Board of Education, New York City v. Harris*, 444 U.S. 130 (1979), the Court concluded that the 1972 Emergency School Aid Act (ESAA) contemplates funding cutoffs in response to forms of discrimination that are not "'discrimination in the Fourteenth Amendment sense.'" *Id.* at 149 (citation omitted). *Harris* then made a critical point in distinguishing the ESAA from Title VI:

> A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when an ESAA violation is found.

Id. at 150.

Justices Stevens, Brennan, and Blackmun concluded in *Guardians*:

> If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress. Title VI must therefore mean what this Court has said it means, regardless of what some of us may have thought it meant before this Court spoke.

> Today, proof of invidious purpose is a necessary component of a valid Title VI claim.

463 U.S. at 641-42.

Justices Stevens, Brennan, and Blackmun, however, opined that proof of discriminatory impact was sufficient to establish violation of regulations adopted to enforce Title VI. *Id.* at 643-45. These justices did not explain how they could cite *Harris* for the principle that Congress intended to limit the application of Title VI to intentional discrimination because of the drastic nature of cutting off all federal funds, yet permit agency regulations to achieve that selfsame drastic outcome.

This inconsistency was strongly opposed by Justice O'Connor who declared:

> Justice Stevens' dissent argues that agency regulations incorporating an "effects" standard reflect a reasonable method of "[furthering] the purposes of Title VI." If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*. Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose.

Id. at 613.

The Court attempted to explain *Guardians* in *Alexander v. Choate*, 469 U.S. 287 (1985), a case brought under Section 504 of the Rehabilitation Act of 1973, which the Court said was patterned after Title VI. *Id.* at 294. While recognizing that no opinion commanded a majority in *Guardians* and that members of the Court offered widely varying interpretations of Title VI,

Alexander nonetheless found that *Guardians* created a two-pronged holding on the nature of the discrimination proscribed by Title VI. First, that Title VI directly reached only instances of intentional discrimination. Second, that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. *Id.* at 293. The Court found that by 1973, model Title VI enforcement regulations incorporating a disparate-impact standard had been drafted by a Presidential task force and the Justice Department, every other Cabinet Department, and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact. *Id.* at 294. The main impetus behind disparate impact liability was thus the federal administrative agencies.

2. The Court Has Mistakenly Deferred to Administrative Agency Construction

In *Alexander v. Choate*, the Court thus said that, even though Congress in enacting Title VI provided that it would apply only to intentional discrimination, regulations adopted by administrative agencies could change the scope of the statute to encompass activities that merely had an adverse disproportionate effect on minorities. *Id.* at 293. But in following administrative regulations that contradicted the intent of the statute, the Court was ignoring its own standards. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 233 (1986), ruled that the Court will not defer to an agency construction where "the legislative history of the enactment shows with sufficient clarity that [it] is contrary to the will of Congress." Similarly, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), held:

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.

Id. at 213-14 (internal quotation marks omitted). And *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997), ruled that deference to an administrative regulation is appropriate only "if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Id.* at 483. As these citations make plain, administrative regulations cannot create federal law. Thus Justice O'Connor's concurrence in *Guardians*, 463 U.S. at 613, was entirely correct. If Congress intended that civil rights laws apply only to intentional discrimination, administrative agencies have no power to change that purpose to include acts that merely have a disparate impact on certain groups. The same rationale applies to the Fair Housing Act.

3. Congress Has Acted to Limit Disparate Impact

Although Congress has acknowledged the courts' imposition of disparate impact analysis on some of its statutory schemes, it has shown its discomfort with the concept by moving to limit its application. For example, Title VII specifically provides in the employment context that seniority systems are exempt from disparate impact. Section 703(h).[3] *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 905 (1989).

Congress further attempted to restrict the use of disparate impact analysis with regard to ability tests for employment in Section 703(h) which provides in part:

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[3] Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h).

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results *is not designed, intended or used to discriminate because of race,* color, religion, sex or national origin.

42 U.S.C § 2000e-2(h) (emphasis added).

Congress also addressed the use of disparate impact in test scores through the enactment of Section 703(l), entitled "Prohibition of Discriminatory Use of Test Scores":

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(*l*).

Thus even though cutoff scores, for example, may have a disparate impact on the basis of race or sex, employers are prohibited by Section 703(l) from adjusting those scores to achieve a more proportional result. Congress also limited the use of disparate impact analysis by prohibiting the award of punitive damages in disparate impact cases. Thus, an action brought under Section 706 of the Civil Rights Act, 42 U.S.C. § 2000e-5, may recover compensatory and punitive damages by alleging unlawful intentional discrimination but only compensatory damages where the charge is merely one of disparate impact. *Landgraf v. USI Film Products*, 511 U.S. 244, 252 (1994).

4. This Court Has Limited the Sweep of Disparate Impact

a. Fourteenth Amendment Violations Require Discriminatory Intent

Although this Court has recognized the concept of disparate impact, it has been uneasy with its application and has often sought to limit it. In *Washington v. Davis*, 426 U.S. 229 (1976), black applicants for a police training program sued alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the test on blacks as compared to whites. *Id.* at 233. The Court held that the petitioners had failed to prove a violation of the Equal Protection Clause, finding that discriminatory intent is the critical element in an equal protection claim and, while disparate impact is not irrelevant to such claim, it is not sufficient as proof of intent. *Id.* at 242.

In *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252 (1977), nonprofit housing developers planned to develop a tract of land into a racially diverse neighborhood for residents with low to moderate incomes. When the village refused to rezone the land for multifamily housing, the developers sued under the Equal Protection Clause, alleging the refusal was racially motivated. *Id.* at 258-59. The Court found that the plaintiffs had failed to prove the key element of discriminatory intent. *Id.* at 270. The Court held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.'" *Id.* at 253 (quoting *Washington v. Davis*, 426 U.S. at 242).

The applicability of disparate impact in cases of alleged sex discrimination was addressed in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). *Feeney*

involved an equal protection claim that the award of veterans preference in employment had a disparate impact on women, proportionately fewer of whom were veterans. The Court noted that *Washington v. Davis* and *Arlington Heights* recognized that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. But the Court found that those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results. *Feeney* held that this principle applies with equal force to a case involving alleged sex discrimination. *Id.* at 273-74.

In *Lewis v. Casey*, 518 U.S. 343 (1996) (involving prisoners' right of access to the courts), the Court reemphasized the holding of *Washington v. Davis*.

> There we flatly rejected the idea that a law neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. We held that, absent proof of discriminatory purpose, a law or official act does not violate the Constitution, solely because it has a . . . disproportionate impact.

Id. at 375 (internal citations and quotation marks omitted).

As the Court summarized: "At bottom, *Davis* was a recognition of the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Id.* (internal citations, quotation marks, and parentheses omitted).

Lewis recognized that the *Davis* court was motivated in no small part by the potentially radical implications of the disparate-impact rationale.

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than the indigent. Under a disparate-impact

> theory . . . regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. . . . [W]e rejected in *Davis* the disparate impact approach in part because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 376-77 (internal citations and quotation marks omitted).

The Court did not discuss why these same considerations would not apply, indeed with far greater force, to disparate-impact regulations adopted by administrative agencies.

b. This Court Has Been Reluctant to Extend Disparate Impact Theory to Other Statutes

When given the opportunity to extend disparate analysis to other civil rights statutes this Court has usually declined. In the latest example, the Court granted certiorari in *Adams v. Florida Power Corporation*, 122 S. Ct. 643 (2001), which raised the question whether disparate impact applied to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq*. The Court, after briefing, then dismissed the writ as improvidently granted, 122 S. Ct. 1290 (2002), leaving intact the Eleventh Circuit holding that disparate impact was inapplicable to the ADEA. *Adams v. Florida Power Corporation*, 255 F.3d 1322 (11th Cir. 2001). But the Court had already declined the invitation to extend disparate impact

to the ADEA in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). There Justice O'Connor, speaking for a unanimous Court, pointed out that "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." *Id.* at 610 (citations omitted). Justice Kennedy, joined by the Chief Justice and Justice Thomas, concurred to emphasize that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII . . . ." *Id.* at 618.

Similarly, the Court has never recognized a disparate impact cause of action under the Equal Pay Act, 29 U.S.C. § 206(d), observing in *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981), that it "was designed differently" from Title VII. The Court also held in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 391 (1982), that 42 U.S.C. § 1981 is limited to disparate treatment and can be violated only by purposeful discrimination.

c. Disparate Impact Analysis Encourages the Use of Racial Quotas

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988), expressed the Court's concern that the disparate impact doctrine could be extended to require the adoption of quotas. The Court found that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures" and observed that "Congress has specifically provided that employers are *not* required to avoid 'disparate impact" as such." *Id.* at 992.

The Court noted that preferential treatment and the use of quotas by public employers under Title VII can violate the Constitution "and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Id.* at 993 (citations omitted). The Court observed, *id.*:

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . .

5. Disparate Impact Doctrine Injures the Public

In *Cureton v. NCAA*, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999), the court found that requiring freshman student athletes to meet standardized test score and grade point average requirements as a condition of eligibility for varsity athletics had an unjustified disparate impact on African-Americans in violation of Title VI and implementing regulations. *Id.* at 714. The Third Circuit reversed on the basis that the NCAA was not subject to Title VI as it was not itself (as distinct from its member colleges and universities) a recipient of federal funding. *Cureton v. NCAA*, 198 F.3d 107, 115 (3d Cir. 1999). The court, however, expressed its concern as to the scope and impact of the disparate impact doctrine, pointing out that neither Congress nor the Departments of Health and Human Services or Education has considered what the consequences would be if disparate impact regulations were expanded beyond their current program specific limitations. "It might well be that such expanded regulations could subject all aspects of an institution of higher education's activities to scrutiny for disparate discriminatory impact beyond anything Congress could have intended." *Id.*

In 1983, California adopted the California Basic Education Skills Test (CBEST), a test to measure teacher proficiency in basic reading, writing, and mathematics skills. Minority

applicants have disproportionately received failing scores on CBEST. *Association of Mexican-American Educators v. California*, 231 F.3d 572, 577-78 (9th Cir. 2000). A class action was brought under Titles VI and VII on behalf of all Latinos, African-Americans, and Asians adversely affected by CBEST. *Id.* Although based on the technical allegations that CBEST had not been properly validated, *id.* at 584, and that the cut-off score was too high, *id.* at 589, the basic thrust of the lawsuit was that the test was too hard. Finding that the test had been properly validated and that there was no suggestion that CBEST was intended to discriminate on the basis of race, the Ninth Circuit, en banc, ruled that " 'the passing scores on the CBEST reflect reasonable judgments about the minimum level of basic skills competence that should be required of teachers.'" *Id.* at 589-90 (quoting *Association of Mexican-American Educators v. California*, 937 F. Supp. 1397, 1420 (N.D. Cal. 1996)). The state was therefore able to avoid the embarrassment of being forced to license teachers who were themselves woefully deficient in education.

Another example of the abuse of the disparate impact standard is *African American Legal Defense Fund, Inc. v. New York State Department of Education*, 8 F. Supp. 2d 330 (S.D.N.Y. 1998). This lawsuit, brought under the implementing regulations to Title VI, claimed that the State of New York's statutory policy of funding the public schools based on attendance had a disparate impact on minority students because of their lower attendance rates. Since minority students were absent more frequently than nonminorities, schools with large minority populations received proportionately less state funding than schools with smaller ratios of minorities. The plaintiffs suggested that state funding be based instead on student enrollment without regard to actual attendance. *Id.* at 338. The court, however, found that plaintiffs' claim that the attendance-based system of distribution has a disparate impact on minorities because of such factors as single parenting, poor

housing, and medical problems, which contribute to absenteeism among inner-city students, was not remediable under Title VI's disparate impact regulations. "[C]learly it is not [the schools'] practices that have produced the absenteeism." *Id.* at 338-39. The court thereupon dismissed the claim. *Id.* at 339. The alternative would have been to remove the incentive for schools to discourage absenteeism on the part of minority students, a policy with disastrous import for the education of those students.

Cureton, Association of Mexican-American Educators and *African American Legal Defense Fund* showcase the counter-productive impact of the disparate impact doctrine. In the name of avoiding discrimination, these lawsuits sought to impose policies that would have had an extremely detrimental impact on society in general and minorities in particular. Dumbing down high school grade and test score requirements in *Cureton* may have made more black athletes eligible to compete at the varsity level as freshmen, but by removing the incentive to study in high school, the policy would have ensured a high failure rate for these individuals in college and ultimately in life. Dumbing down the CBEST in *Association* would have qualified more minorities to teach, but would have removed any incentive for those individuals to improve their knowledge of basic academics and would have provided an inferior education, not to mention a negative role model, for their students. Lastly, the policy of ignoring minority absenteeism in the public schools, sought in *African American Legal Defense Fund*, would send the negative message that absenteeism is an expected characteristic of minority students and therefore must be accepted.

It is time for the courts to rethink the use of disparate impact. When a disparity is caused by intentional racial discrimination, it should be remedied in an appropriate manner. That is what Congress intended in the enactment of the Fair Housing Acts and the other civil rights laws. But when a

disparity is the result of policies that result not from intentional discrimination but from factors such as socio-economic disadvantage, the courts should decline to intervene. By focusing on intentional discrimination, the courts can ensure that it is rooted out wherever it may be found. At the same time, by discarding the disparate impact doctrine, the courts can guard against outcomes that, while well-meaning in intent, are disastrous in practice.

II

THE CONSTITUTIONAL RIGHT TO MAKE REASONABLE USE OF LAND IS A PROPERTY INTEREST PROTECTED BY SUBSTANTIVE DUE PROCESS

The court below found that Buckeye has a constitutionally protected property interest arising from its city council-approved site plan. The court reasoned that "plaintiffs' property interest was securely vested upon the City's affirmative representation that the site plan conformed with the existing zoning regulations," and the alleged substantive due process violation resulted when plaintiffs were denied "the benefit of their lawfully approved site plan." *Buckeye*, 263 F.3d at 642-43. That analysis—characterizing protected property interests in the land use context as "vested rights," "benefits," or "entitlements," and failing to recognize ownership of land as a constitutionally protected property interest—misinterprets the holding in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). And the result is ironic. This Court's expansion of the definition of property interests in *Roth* serves as the basis for denying due process protection for traditional property interests that received due process protection long before *Roth* was decided.

A constitutionally protected property interest is an essential element of a claim for violation of due process rights. *Roth*, 408 U.S. at 570. A few circuits continue to recognize the

principle established prior to *Roth*—ownership of the affected real property is sufficient to establish a property interest protected by due process.[4] But the majority of federal courts have read *Roth* to require a "legitimate claim of entitlement" to a particular use of property.[5] Those courts, like the Sixth Circuit Court in this case, do not look to ownership of property. Instead, those courts ask if a property owner has a right to a permit to use property in a particular manner.

Roth and its companion case, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), are procedural due process cases alleging a property interest in continued employment at state-run colleges and universities. *See Perry v. Sindermann*, 408 U.S. at 601 ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."), and *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). *Roth* and *Perry* established an "entitlement approach" that is properly applied to cases seeking a property interest in valuable government benefits; the "entitlement approach" has no application when a

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[4] *See, e.g., DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592, 594, 595-96 (3d Cir. 1995), and *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994).

[5] *See, e.g., Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63, 68-69 (4th Cir. 1992); *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202-03 (6th Cir. 1995); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989).

court is asked to decide whether land use decisions involve illegitimate government action.

Substantive due process protection in land regulation cases does not depend on a vested interest in a particular permit or an entitlement to use property in a certain manner. Due process protection attaches to property ownership because landowners have a constitutionally protected interest in using their property. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), a property owner challenged a local zoning ordinance on due process and equal protection grounds. The ordinance was alleged unconstitutional on its face—no development permit had been sought. *Id.* at 386. Still, the property owner had a property interest sufficient to sustain a claim for the violation of due process rights. *Id.* The Court specifically rejected Euclid's argument that the suit was premature because the landowner had not participated in the regulatory procedure set up for obtaining permission to use property in a particular way. *Id.* Since there was no license, permit, or classification to establish a protected property interest allowing Ambler to maintain its Fourteenth Amendment claims, the foundation for that interest had to be ownership of the property. And if ownership of property establishes a protected property interest for a facial challenge, logically it must do the same for an as-applied challenge.

Village of Euclid is not at all inconsistent with *Board of Regents of State Colleges v. Roth* and *Perry v. Sindermann*. In *Roth* and *Perry*, this Court did not adopt a standard for identifying protected property interests in every context. Rather, those decisions expanded due process protection to cover more than the traditional forms of property (e.g., ownership of real estate, chattels, or money). The Court recognized other, new forms of protected property, arising from public benefits. *Roth*, 408 U.S. at 571-72 ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate,

chattels, or money."); *Perry*, 408 U.S. at 601 (" '[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms.").

The distinction between traditional forms of property and newer forms of "property" arising from public benefits is crucial. *Roth* held that property rights are not created by the Constitution, but are created and defined by an independent source, such as state law. *Roth*, 408 U.S. at 577. But in *Roth*, the Court was concerned with public benefits ("new property"), not the traditional forms of property. *See generally* Reich, Charles, *The New Property*, 73 Yale L.J. 733 (1964). Property owners are not claiming the right to a government-established benefit when they seek to make use of their property. They are claiming the right to use property in a reasonable manner. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court explained that the protected property interest was not a permit to build, but the right to put the property to reasonable use.

> [T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit."

Id. at 833 n.2.

Judge Easterbrook, writing for the Seventh Circuit Court in *River Park, Inc. v. City of Highland Park*, 23 F.3d at 166 noted that "[t]hose things people can hold or do without the government's aid count as property or liberty no matter what criteria the law provides."

One of the defining characteristics of property ownership is that the owners are allowed to use their land. *See Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (In a due process challenge to a land use regulation the Court held: "The right of the trustee to devote its land to any

legitimate use is properly within the protection of the Constitution."). Although government may seek to restrict the right of the owner to use property in a particular way, the regulatory process must not be confused with the property interest at stake. *Palazzolo v. Rhode Island*, 533 U.S. at 627 (Government cannot define property by its regulations; "The State may not put so potent a Hobbesian stick into the Lockean bundle."). As stated in *River Park*, 23 F.3d at 166:

> An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property.

Protected property interests cannot be defined by the regulatory process, for the simple reason that regulating bodies have full authority to create—or not create—entitlements.[6] Courts following the "entitlement approach" focus on the degree of discretion enjoyed by the authority issuing an application or permit.[7] Where there is discretion, there is no entitlement. But the fact is that all but the most routine land use decisions are highly discretionary. Judge Easterbrook offered an extreme example of why traditional forms of property must retain their status as constitutionally protected property.

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[6] *See* Mandelker, Daniel R., *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 2: Property Rights: Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash. U. J.L. & Pol'y 61, 66, 75 (2000).

[7] *See, e.g., RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d at 918 (A constitutionally protected property interest exists only if the issuing authority has so little discretion that it is almost certain a proper application will be approved.).

> Otherwise a single local ordinance providing that "we may put your land in any zone we want, for any reason we feel like" would abolish all property rights in land overnight. The due process and takings clauses are made of sterner stuff.

River Park, Inc. v. City of Highland Park, 23 F.3d at 166.

The Third and Seventh Circuit Courts do not look to *Roth* and *Perry* to define protected property interests. Instead, those courts recognize that the right to use property, subject to reasonable limitations, is an interest protected under the Due Process Clause. In *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d at 596, appellant property owner challenged the Zoning Board's (1) determination that use of his property to house an auto body repair business violated West Amwell's zoning ordinance, and (2) refusal to approve a use variance. The Third Circuit included ownership in the set of property interests worthy of substantive due process protection. *Id.* at 600-01.

> Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Id. at 601.

The Seventh Circuit also finds a protected property interest in land ownership. *River Park*, 23 F.3d at 165-66, deals with property used as a golf course, but zoned for limited residential housing. River Park, the owner of the property, sought to have

the zoning changed to allow more homes to be built on the property, but the city council delayed the rezoning decision for so long that River Park was forced into bankruptcy. *Id.* River Park sued for damages for violation of the Due Process Clause. *Id.* The complaint was dismissed because the trial court determined that River Park did not have a legitimate claim of entitlement to the rezoning permit, and thus had not been deprived of any property. *Id.* On appeal, the Seventh Circuit held that River Park was entitled to due process of law.

> River Park may well have lacked a property interest in one classification rather than another. But it surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process. . . . An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property.

Id. at 165-66.

In this case, the court found the basis for a substantive due process claim based on Buckeye's entitlement to a city council-approved site plan. The court was correct in concluding that Buckeye has a protected property interest that gives rise to due process protection, but that property interest is not Buckeye's entitlement to an approved site plan. Ownership of the property at issue in the lawsuit, in and of itself, is a protected property interest that allows Buckeye to challenge arbitrary and capricious government action connected with the regulatory process.

CONCLUSION

For the reasons set forth herein, Amici urge this Court to reject the expansion of disparate impact liability to the Fair Housing Act and further to reject the entitlement theory as applied to substantive due process claims in land use cases, and rule that ownership of land is a property interest worthy of substantive due process protection.

DATED: August, 2002.

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Supreme Court, U.S.
FILED
SEP 6 2002
OFFICE OF THE CLERK

No. 01-1269

In The

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, OHIO, et al.,

Petitioners,

vs.

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICI CURIAE*, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE CITY OF GARLAND, TEXAS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The International Municipal Lawyers Association ("IMLA") and the City of Garland, Texas, as *amici curiae*, file this brief in support of the Petitioners, the City of Cuyahoga Falls, Ohio, *et al.*[1]

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since its establishment, IMLA has supported the interests of local governments, and the attorneys who represent them, through its Legal Advocacy Program. Specifically, the Legal Advocacy Program of IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties regarding the filing of this brief have been filed with the Clerk. In accordance with this Court's Rule 37.6, *amici curiae* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

that affect them. IMLA has appeared as an *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The City of Garland, Texas is a home-rule municipality located in Dallas County, Texas. The charter of the City of Garland, like that of the City of Cuyahoga Falls, contains initiative and referendum provisions that offer the people an opportunity to directly engage in the democratic process through the exercise of their right to vote. And, like the charter provision at issue in this case, the City of Garland's charter provides that the certification of an issue for a vote by referendum stays the effectiveness of the ordinance that is the subject of the referendum until a vote on the referendum is obtained.

Amici curiae are especially interested in this case because, on the most elemental level, the City of Cuyahoga Falls is facing liability simply because its citizens made use of the referendum process – notwithstanding that the elected and appointed officials of Cuyahoga Falls did everything that the plaintiffs expected of them short of ignoring the Cuyahoga Falls municipal charter. If the reasoning of the Sixth Circuit Court of Appeals is allowed to stand, the causation and attribution principles expressed by this Court in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978) and as recurrently reaffirmed in its progeny, must necessarily be abandoned, to be replaced by an astonishingly expansive theory of liability under which a municipality may be liable if *anyone* in *any way* connected with the municipality acts in an unconstitutional manner. In that vein, *amici* are vitally interested in the outcome of this case.

SUMMARY OF THE ARGUMENT

At a prefatory glance, this case appears to invite the Court to explore new territory in the realm of municipal liability pitting, as the case seems to do, the constitutional rights of a property owner (bolstered by the statutory rights provided by the Fair Housing Act, 42 U.S.C. §3601, *et seq.*) against the rights of the people to engage in some of the most fundamental aspects of democracy, including the right to freely speak one's mind in a public forum, and to participate in a public election. This Court need not, however, fall prey to the temptation to analyze this case on that level. At bottom, this case is simply not that complicated; it does not require this Court to determine any difficult questions of municipal liability under Section 1983 or to express any novel principles about the reach of the Fair Housing Act with respect to municipal defendants. Under the well-established tenets of Section 1983 municipal liability and based upon the plain language of the Fair Housing Act, the district court's judgment may, and should be, affirmed.

ARGUMENT

1. The limited nature of Respondents' injury.

Respondents' ultimate complaint in this case is that certain citizens of Cuyahoga Falls invoked the referendum provisions of their city's charter thereby occasioning a delay in the issuance of the building permit needed to construct Respondent's proposed housing project. That is necessarily the gist of Respondents' grievance because, except for obeying the clear language of the City's charter and laws, the City did everything that Respondents had

asked. Only the intervening circumstance of the referendum petition stood in the way of Respondents.

Respondents needed to obtain a site plan in order to commence building their housing project. Their first step was getting a recommendation of approval for their site plan by the City of Cuyahoga Falls[2] Planning Commission. The Planning Commission did just that. The Respondents' next step was getting the Planning Commission's recommendation approved by the City Council. Again, the Respondents got what they wanted from the City. Rather than bow to the pressure of community opposition, the City Council accepted the Planning Commission's recommendation and likewise approved Respondents' application. There appears to be no dispute that absent anything else the City would have issued a building permit immediately upon the approval of the site plan and Respondents' compliance with the preliminary (and uncontested) conditions of that approval. And, after all was said and done, that is just what happened. As soon as no legal impediment stood between the City Council's approval of Respondents' site plan and the issuance of a building permit, the City issued that permit and Respondents began the construction of their housing project.

Thus, what Respondents are really left to complain about is the citizens' invocation of a referendum to challenge the City's approval of Respondents' site plan. As is the case with many municipal referendum provisions, the Cuyahoga Falls city charter provides that once a

[2] Where the context allows, for brevity the various Petitioners will be collectively referred to herein as "the City".

referendum petition has become effective, the ordinance against which the referendum is directed is stayed pending a vote of the people. *See*, 5 E. McQuillin, Law of Municipal Corporations §16.53 (3d Ed. 1996) (describing purpose and effect of referendum procedures). The referendum petition effectively suspended the City's approval of Respondents' site plan. Until it was determined as a matter of state law that the people of Ohio may not use the power of referendum to overturn administrative – as opposed to legislative – actions, the approvals sought by Respondents and granted by the City could not go into effect.

2. Any constitutional harm suffered by Respondents was not caused by nor otherwise attributable to the City under Section 1983.

Assuming, for the sake of argument, that the delay resulting from the resolution of the referendum issue produced actionable harm to the Respondents, the only question presented to this Court is whether that supposed harm is fairly attributable to the City. Under the fault and causation standards consistently employed by this Court in the context of civil rights actions under 42 U.S.C. §1983, the City cannot be liable. Similarly, under the Fair Housing Act, it cannot be said that any action on the part of the City denied or made unavailable a dwelling to the Respondents because of race.

Under *Monell* and subsequent cases, this Court requires a plaintiff seeking to impose liability on a municipality under Section 1983 to identify a municipal "policy" or "custom" that caused the plaintiff's injury. *See, Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 at 694 (1978), *Pembaur v. City of Cincinnati*, 475 U.S.

469 at 480-81 (1986), *and City of Canton, Ohio v. Harris*, 489 U.S. 378 at 389 (1989). The reason for requiring a plaintiff to locate a distinct policy is that it ensures that a municipality is held liable only for those constitutional deprivations that result from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 97 at 403 (1997).

Even if a policy chargeable to the municipality is identified, liability under Section 1983 is not established until that policy is shown to be the cause of the plaintiff's injury. "[I]t is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* at 405 (emphasis in original).

The court of appeals did not engage in the sort of elementary, but indispensable, analysis of attribution and causation as described above. Had it done so, it would have had to come to the conclusion that the moving force behind Respondents' harm – the referendum – could not be fairly attributed to the City. The supporters of the referendum caused the delay, not the City. Contrary to what the court of appeals assumed, the City did not "give effect" to the wishes of the people. The referendum itself took care of that because the referendum stayed the effectiveness of the City's actions.

For the court of appeals to assume, as it apparently did, that City officials were free to ignore the effect of the City's referendum provision asks too much. First, there is no body of law that gives municipal officials the sort of power that the court of appeals presupposes those officials possess, that is, the ability to disregard with impunity facially constitutional, controlling state and municipal laws.[3] Second, even if municipal officials could ignore an otherwise binding law whenever there was an allegation that those who were resorting to that law were unconstitutionally motivated, there has as yet never been a *finding* that the supporters of the referendum were in fact motivated by racial animus. Indeed, Respondents survived affirmation of the district court's summary judgment only because the court of appeals determined that there were genuine issues of material fact on the question whether racial bias played a part in the story. Under those circumstances, it cannot be legitimately argued that the City was required to assume that Respondents' allegations were in fact true and then, based on those assumed facts, disregard the citizens' right to hold a referendum election.

Although the City could not and did not "give effect to" the wishes of the people, it could be argued that the Respondents' injury may still be attributed to the City because the people themselves caused that injury through

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[3] Had the City done so, the City could just as well have faced Section 1983 liability for abridging the voters' First Amendment rights to vote and associate. *See, e.g., Bonas v. Town of North Smithfield*, 265 F.3d 69 at 74 (1st Cir. 2001) ("It is certain that the right to vote – the wellspring of all rights in a democracy – is constitutionally protected. [T]his means that the right to vote in local elections (including referenda elections) is constitutionally protected."

their use of the referendum process. In a sense, the people *are* the ultimate policymakers. Thus, if the people behave unconstitutionally on their collective own, rather than through their elected representatives, would it not be just as fair (if not more so) to hold them accountable under Section 1983 the same as if their representatives had committed the wrong on the people's behalf?

Whether that theory would be tenable under our notions of representative democracy and however interesting that question may be in an abstract sense, it need not be answered in this case. The locus of "final policymaking authority" is a matter of state law. *McMillian v. Monroe County, Ala.*, 520 U.S. 781 at 786 (1997). After an about-face, the Ohio Supreme Court determined that the people of Ohio may not trump decisions of their city officials through the referendum process on administrative as opposed to legislative matters. *Buckeye Comm. Hope Foundation v. City of Cuyahoga Falls,* 82 Ohio St. 3d 539, 697 N.E.2d 181 (1998). Hence, at least with respect to the approval of site plans, the people of Cuyahoga Falls do not have final policymaking authority through the invocation of the referendum.

3. The City did not violate the Fair Housing Act.

"The [Fair Housing] Act does not mention municipalities, in fact does not say who may or may not be sued – it just says that 'it shall be unlawful' to discriminate. . . . But the cases hold or assume . . . that the Act applies to municipalities, and specifically to their zoning decisions." *Hemisphere Bldg. Co., Inc. v. Village of Richton Park,* 171 F.3d 437 at 438 (7th Cir. 1999). Whether or not the Fair Housing Act applies to the municipalities and their zoning

decisions, under the plain language of the statute, the City has done nothing to violate it.

Respondents claim that the City violated 42 U.S.C. §3404(a) of the Fair Housing Act. That section makes it unlawful to, *inter alia*, "otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. §3604(a). Even if the Fair Housing Act imposes strict liability for violations of the Act, the law clearly presupposes some causal connection between the violation and the alleged wrongdoer. Clearly the City here did nothing that would have made unavailable or denied the proposed housing project to anyone. As discussed above, the City *approved* everything that the Respondents had sought. But for the intervening of the referendum, Respondents would have had everything they wanted, when they wanted. In the end, they got what they wanted without the need to resort to the equitable remedies provided by the Act to get there. Under those circumstances, Respondents should not be allowed to use the Fair Housing Act to retroactively punish the City for something that the City did not cause and that it could not control.

CONCLUSION

Amici curiae respectfully request this Court reverse the judgment of the court of appeals and affirm the judgment of the district court.

Respectfully submitted,

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Supreme Court, U.S.
FILED

AUG 30 2002

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Nº. 01-1269

In The
Supreme Court of the United States

THE CITY OF CUYAHOGA FALLS, ET AL.,
Petitioners,
v.
BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF ATHENS OHIO AND THE OHIO MUNICIPAL LEAGUE

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STATEMENT OF *AMICUS* INTEREST

The City of Athens, Ohio, is a municipality located in the south eastern corner of the state. The Ohio Municipal League (hereinafter "the League") is a non-profit Ohio Corporation composed of a membership of more than 750 Ohio cities and villages. All of the citizens and taxpayers of these entities have an interest in seeing the anti-discrimination and civil rights laws of this nation applied to municipalities fairly and in a manner consistent with good public policy. The Sixth Circuit Court of Appeals opinion below does not achieve this goal because it holds the City of Cuyahoga Falls liable for following existing law related to referendum procedures. The lower court's decision also holds the City liable for unlawfully discriminating, despite the absence of any evidence that any municipal official intended to discriminate against anyone. This decision adversely impacts all of the municipalities in the State of Ohio.

Accordingly, the City of Athens, Ohio, and the Ohio Municipal League have an interest in seeing the lower court's decision reversed.

QUESTION PRESENTED

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may a court inquire into the motivations of a handful of the citizens, who are not officials with the city, who expressed support for the referendum and impute those motivations to the entire municipal corporation?

2. In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against the municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?

3. Does the Due Process Clause of the Constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

PARTIES TO THE PROCEEDINGS

Petitioners are (1) the City of Cuyahoga Falls, (2) the Mayor of the City, Don L. Robart, (3) the former City Engineer, Gerald Dzurilla, and (4) the former Clerk of City Council, Gregg Wagner. Respondents are (1) Buckeye Community Hope Foundation, (2) Buckeye Community Three, L.P., (3) Cuyahoga Housing Partners, Inc., and (4) the Fair Housing Contact Service.

SUMMARY OF THE ARGUMENT

1) There is no evidence of municipal intent or purpose to discriminate. Such evidence is a prerequisite to a finding of a violation of equal protection. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555 (1977) . No official action or policy by the City manifested the intent to discriminate, and the City cannot be held liable in the absence of such evidence.

2) The speculated racial animus of a minority of residents who oppose low income housing in their community cannot be imputed to the municipality, where no official municipal law or policy implements the minority's position. The application of facially neutral election law cannot be used

to impute discriminatory intent on the part of municipal officials. *See Arlington Heights*, 429 U.S. at 252; *Bd. Of County Comm'r of Bryan County Oklahoma v. Brown*, 117 S. Ct. 1382, 1394 (1997); *Monell v. Dep't of Soc. Serv. Of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2027 (1978).

3) It is contrary to the spirit and intent of the First Amendment to hold a municipality liable for the actions of a minority of the populace which exercises its rights to petition the government, thereby delaying the issuance of building permits to a property owner. *See Meyer v. Grant*, 486 U.S. 414 (1988); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *James v. Valtierra*, 402 U.S. 137 (1971)

4) In the absence of a state recognized property right, there is no substantive due process claim. *See Bd. Of Regents v. Roth*, 408 U.S. 564 (1972). No such property right existed in this case, and the respondents are not permitted to maintain its substantive due process claim against the City. A due process claim also requires the municipal action to be arbitrary and capricious. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). The City's compliance with facially

neutral elections law and court orders in pending state court actions preclude such a finding in this case, as a matter of law.

STATEMENT OF THE CASE AND FACTS

The City of Athens, Ohio and Ohio Municipal League, *amici curiae*, hereby adopt and incorporate by reference, the Statement of the Case and Facts of the Petitioner, the City of Cuyahoga Falls.

ARGUMENT

There was No Municipal Action Evidencing Discriminatory Intent

Neither the City of Cuyahoga Falls nor any municipal official took any action which deprived any person of his or her constitutional rights. The Court of Appeals improperly inquired into the motives of a small minority of citizens, who circulated a petition, to find a basis for liability against an entire city for alleged discrimination.

This court has held:

> [O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact

is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." **Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection clause.**

(Emphasis added.) *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976)).

The City of Cuyahoga Falls did not have the requisite discriminatory intent because the actions of the Mayor, the Clerk of City Council, and the City Engineer were in compliance with the law. The City officials did not intend to discriminate based on race; their only intentions were to follow the law in carrying out their duties.

This court has identified the following objective factors that may be probative of racially discriminatory intent: (1) the racial impact of an official action, (2) the historical background of the decision, (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms, and (4) the legislative or administrative history of the decision. *Arlington Heights*, 429 U.S. at 266-67, 97 S.Ct. at 563-64.

When Buckeye expressed an interest in developing a low income housing project in the City of Cuyahoga Falls, the Mayor expressed no objections to the idea. Thereafter, Buckeye bought land and began planning the site with the City Planning Director. The City Planning Commission approved a site plan with certain conditions. One of the conditions precedent to obtaining a building permit for the housing project was to erect a fence on one side of the site.

The project was then approved by City Council in the form of Ordinance 48-1996. These are the "official actions" of the City, and all of them were favorable to the respondents. Thus, under the first prong of the *Arlington Heights* test, there was no "official action" which had an adverse racial impact.

Although the Mayor no longer supported the project, he silently approved the project by not exercising his veto power over the ordinance. The ordinance was to take effect May 2, 1996, and this was the earliest date the City could issue building permits.

Pursuant to the Charter of Cuyahoga Falls, at least ten percent (10%) citizens of the City exercised their right to petition the government and filed a referendum petition

seeking a popular vote on the Ordinance. The Charter provided that the citizens had "the power to approve or reject at the polls **any ordinance or resolution** passed by the Council." Cuyahoga Falls Charter, Article IX, Section 2 (Emphasis added).

Because the facially neutral referendum petition was timely filed and had the requisite number of signatures, the Clerk of City Council properly certified the petitions to the Summit County Board of Elections. In doing so, the Clerk of City Council was motivated solely by a desire to carry out her legal duties, not racial animus. There is no evidence to the contrary in the record.

Under Article IX, Section 2 of the Charter, the filing of the referendum petitions stayed the effectiveness of the Ordinance. Because the pending referendum prevented the issuance of a building permit, the City Engineer necessarily did not issue Buckeye a building permit. Furthermore, Buckeye had not complied with the pre-condition of obtaining the building permit, i.e. by building a fence. The City had even issued a permit for the fence before the referendum petition was filed. In light of the failure to erect the required

fence, even if the referendum petitions had not been filed, the City Engineer's refusal to issue the permits was lawful. There is no evidence in the record that the City Engineer was motivated by racial animus; he had no legal authority, at that time, to issue the permits to Buckeye. When he eventually did have such authority, the permits were issued.

Buckeye brought an action in the Summit County Common Pleas Court arguing that the referendum violated the Ohio Constitution because the Cuyahoga Falls Charter permits referenda to review "any ordinance or resolution" and does not distinguish between legislative and administrative actions. The Ohio Constitution reserves to the people the power of referendum over legislative actions. The Common Pleas Court held that people of chartered municipalities could reserve unto themselves broader referendum rights than are reserved by the Ohio Constitution. The Ohio Ninth District Court of Appeals and the Ohio Supreme Court affirmed that the referendum petition was lawful. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). Ultimately, the Supreme Court of Ohio reconsidered the case, and held that municipal charters cannot reserve to the electorate greater powers of referendum than

does the constitution. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539 (July 16, 1998).

At all times, the City obeyed the courts' orders. The City's legal obligation was to honor the judicially upheld referendum, and its preemptive effect on the City's ability to issue the building permits. These facially neutral actions cannot be deemed to subject the City to liability for discrimination.

The Sixth Circuit relied on the following statement in *United States v. Yonkers Bd. of Education.*, 837 F.2d 1131, (2d Cir. 1987):

> The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens.

Id., at 1224, cited in *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 263 F.3d 627, 634 (6th Cir. 2001).

The Sixth Circuit also cited *Hunter v. Erickson*, for the proposition:

> [T]he implementation of the majority will through referendum is not immune from judicial scrutiny since the "sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." (*Hunter v. Erickson*), 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed. 2d 616, 623 (1969); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed. 2d 313, 326 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause...") Thus, if there is evidence that residents of Cuyahoga Falls were motivated, in part, by racial bias, the City can not give effect to that bias simply because its City Charter provides for referendum.

Buckeye Community Hope Foundation v. Cuyahoga Falls, 263 F.3d 627, 635 (6th Cir. 2001).

The problem with the Sixth Circuit's analysis is that, unlike cases wherein a plebiscite may have enacted a law which is constitutionally infirm, a majority of the citizens of Cuyahoga Falls did not, in fact, deprive the respondents of anything. Ten percent (10%) of the electorate was able to delay the project, until the Ohio Supreme Court ultimately held that the referendum procedure was not appropriate for

the determination of specific property rights that had been adjudicated by non-legislative action. It cannot be forgotten that the official City action (the passage of the ordinance), was in favor of the respondents.

It is well established that a single policy maker may subject a municipality to liability under 42 U.S.C. §1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452, (1986). In this case, no City official (policy maker or otherwise) performed any action which delayed the respondents' development, other than following facially neutral state law which stays the effective date of ordinances which are the subject of referendum procedures. The minority of residents, which prevented the respondents from building their development as quickly as they would have liked, cannot be deemed to be policy makers for the City because they are neither City officials nor do they possess the power (as the minority) to impose their policy preferences on others.

It is important to note, although the Mayor expressed his concerns about the issue of "low income housing," the Mayor had the power to prevent the plan from being approved

by vetoing the subject ordinance. He allowed the ordinance to become law without his signature, thereby not exercising his legal the power to prevent the project. At all times the Mayor's actions were lawful and could not be used to impute discriminatory intent to the City.

The City and its officials had no legal authority to issue permits to Buckeye until the Ohio Supreme Court reversed itself in a 4-3 decision after one Justice changed her vote. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539 (July 16, 1998) (holding that referendum petitions are limited to legislative and not administrative actions). At this time, the City obeyed the decision, and once the pre-conditions were met, the City issued the building permits. The project has since been completed.

The comments of a few citizens that could be construed as racist cannot be imputed to the City of Cuyahoga Falls to find racist intent on behalf of the City. *See Arlington Heights*, 429 U.S. at 252; *Bd. Of County Comm'r of Bryan County Oklahoma v. Brown*, 117 S. Ct. 1382, 1394 (1997) (holding in a Section 1983 action that "Congress did not

intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights"); *Monell v. Dep't of Soc. Serv. Of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2027 (1978) (holding that a plaintiff in a Section 1983 action must show that a municipality, through its deliberate conduct, was the "moving force" behind the injury alleged).

First Amendment Freedoms of Political Expression

The First Amendment protects the freedom of political speech and the right of the people to petition the Government.

Citizens of any community are entitled to express their opinions about issues concerning their community. This court has recognized the right to preserve and protect the right of referendum. *See Meyer v. Grant*, 486 U.S. 414 (1988); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *James v. Valtierra*, 402 U.S. 137 (1971) (holding a California constitutional provision that required a referendum on all low-income housing projects to be lawful). In *Meyer*, this court recognized that the right to initiative, which is functionally the same as referendum, involved "core political speech," and the right to petition for political change and to

engage in discussions about that change "is guarded by the First Amendment." The right of the people to petition their government and to speak openly about their political views and concerns is at the heart of the First Amendment. As such, the opinions and concerns of the citizens in this case are protected by the First Amendment.

It seems contrary to the spirit and intent of the First Amendment to hold a municipality (and all of its taxpayers) liable for the expressions and the political actions of a vocal minority of the municipality's voters, particularly since the official municipal actions favored the respondents.

No Substantive Due Process Claim

The due process clause of the constitution does not require a municipal corporation to issue building permits when the underlying conditions for the issuance of the building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction.

To establish a due process claim, this court has held that a plaintiff must first establish a property interest in the thing denied. *See Bd. Of Regents v. Roth*, 408 U.S. 564

(1972). Buckeye had no property interest in the building permits at the time they were denied by the City because they had not fulfilled the pre-requisite conditions, i.e. erecting a fence. Further, the referendum, which was believed to be lawful at the time, stayed all proceedings while approval of the site plan was put to a popular vote.

Courts have held that as long as the governing body retains some discretion in denying the sought-after permit or approval, there can be no property interest subject to federal due process protection. *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995); *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992). Buckeye claims that the referendum denied them of site plan approval and the resulting issuance of building permits. Because the Charter of Cuyahoga Falls reserves discretion to the City in considering site plans, Buckeye had no property interest in the site plan approval. Therefore, Buckeye has no substantive due process claim. *See Regents* at 564; *Triomphe* at 198; *Gardner* at 63.

A due process claim also requires that the government's actions be arbitrary and capricious in the strict

sense. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). This would mean that there would have to be no rational basis for the City denying the permits. *Id.* This is not the case. The City followed the law of its Charter and three Ohio court judgments, including the Ohio Supreme Court, which held its Charter to be lawful. The City was required by law to withhold the permits because the referendum stayed the effectiveness of the site plan approval. When the Ohio Supreme Court eventually reversed itself, the City issued the permits accordingly. As such, the City acted rationally, in conformance with the law, at all times.

This court has held that due process does not guarantee that a city will never make an incorrect decision that gets overturned through litigation. *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). Respondents apparently seek to overrule *Bishop, sub silento*.

Because Buckeye had not met the underlying conditions for the issuance of the building permits, and because the permits were required withheld pursuant to the judgments of competent state courts, Buckeye had no property interest in the building permits, and therefore cannot

establish a due process violation claim against the City. For these reasons, the *amici* urge this court to reverse the holding of the Sixth Circuit.

A Facially Neutral Referendum Does Not Have a Disparate Impact

A disparate impact claim under the Fair Housing Act cannot be maintained against the City for the alleged impact of the filing of the facially neutral referendum petition, which was upheld by the courts until the Ohio Supreme Court reversed its prior determination that the referendum was permissible under the Ohio Constitution. This court has never held that a disparate impact claim can be established by the impact of a facially neutral referendum. Also, the Sixth Circuit, until this case, had not recognized such a claim. *Clarke v. Cincinnati*, 40 F.3d 807 (6th Cir. 1994); *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986). In this case, the Sixth Circuit erred by putting statutory interests above constitutional rights, creating unmanageable risks for municipalities. The City should not be punished because its citizens petitioned their government or because the City obeyed court judgments in a pending case.

CONCLUSION

The *amici* respectfully request this court to reverse the judgment of the Sixth Circuit in order to prevent a majority of the taxpayers of a municipality from being held liable for the words and actions (arguably insulated under the First Amendment) of a minority of the voters of the municipality.

Every action by the City of Cuyahoga Falls, and all of its officials, comported with the law, and no evidence supports the conclusion that the City's officials were animated by any interest other than following the law.

This court is urged to reverse the decision of the Sixth

Circuit Court of Appeals, and enter judgment on behalf of the petitioners.

Respectfully submitted,

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MOTION FILED

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No. 01-1269

IN THE

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, *et al.*,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF AMERICAN PLANNING ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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American Planning Association ("*amicus*") hereby moves for leave to file a brief *amicus curiae* because: (1) it is late and (2) consent to file this *amicus curiae* brief has not been provided by the City of Cuyahoga Falls, Petitioners. A copy of the proposed brief is attached.

Amicus was unable to file this brief within the applicable time period due to the numerous consultations it had with other *amici* filing in their matter.

As more fully explained in the brief under "Interest of *Amicus Curiae*", *amicus* American Planning Association is a nonprofit organization that represents practicing planners, officials, and citizens involved in fair housing issues, among others. The American Planning Association wishes to concur with the argument advanced by Amici National Fair Housing Alliance and AARP in Part III of their brief concerning the disparate impact test.

Accordingly, the American Planning Association respectfully requests that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Amicus Curiae American Planning Association will briefly address the following question:

> In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of filing of a facially neutral and judicially upheld referendum petition?

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning — including physical, economic and social planning — at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society.

The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 17 divisions devoted to specialized planning interests, including the Housing and Human Services Division. The APA represents more than 30,000 practicing planners, officials, and citizens involved with urban and rural planning issues. These members are involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations.

The APA has filed amici briefs in a number of very important fair housing and referendum cases, including *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) and *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776 (1995).

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1. Counsel for the *Amicus* were the sole authors of this brief. No person or entity other than *Amicus* made a financial contribution to this brief.

As the need arises, the APA develops policies that represent the collective thinking of its membership, and represents a collective view on both positions of principle and practice. Such policies are developed through a strenuous process that involves examination and review by both the chapters and the divisions of APA. In recent years, a number of policies have been adopted that highlight APA's concerns about fair housing and social equity issues. Several of these policies are included here to stress the importance of the disparate impact argument with which APA joins.

ARGUMENT

Amicus APA has filed this brief to indicate its agreement with Part III of the brief filed by Amici National Fair Housing Alliance and AARP. In that part of their brief, they argue that the Court should interpret Title VIII of the Fair Housing Act of 1968 to require only proof of disparate impact, not disparate intent, in order to prove a claim of racial discrimination. The APA joins in this argument and believes, as does the Amici National FHA and AARP, that it represents a correct interpretation of Congressional intent in the enactment of this legislation.

Racial discrimination is not just a matter of intent or what public officials believe. The wrong of racial discrimination is the restrictive effect it has on the opportunities for racial minorities to find and secure housing. The APA, in its adopted policies, has clearly stated that racial discrimination in the marketplace for housing is not to be tolerated.

The following policies were adopted by the APA Board of Directors in April, 1999:

> *General Policy Position #4 — Planners should help to eliminate housing discrimination in their communities.*
>
> *General Policy Position #5 — Planners should work to minimize the economic stratification of cities by income level, segregating the poor into one district, the middle-class into another, and the rich into yet another. Although this has been federal policy for over twenty years, its implementation at the local level has been slow.*

Specific Fair Housing Policy:

> *(a) APA National and Chapters fully support the provisions of the Fair Housing Act, and are dedicated to providing education, training and outreach to enable planners and their communities to eradicate discriminatory housing practices; and*
>
> *(b) Planners should identify, document, and eliminate impediments to fair housing contained within comprehensive plans and/or zoning regulations, including, but not limited to, special use permits for group homes, large lot zoning when used for the purposes of exclusion, and restrictive single family definitions. In accordance with the as-of-right principle, community residences must be designed and operated to exert no or minimal impact on adjacent properties.*

> *Such efforts should be performed in a manner consistent with federal requirements for fair housing performance standards.*

Most recently, the Board of Directors adopted a policy guide on smart growth in April 2002 which emphasizes the importance of addressing racial and social equity concerns in the community planning process.

> *The American Planning Association and its Chapters support increased social, economic, and racial equity in our communities. . . .*

Clearly, these policies require an inquiry into racially discriminatory zoning actions, and the effect they have on the housing market, as Congress intended. This case is an opportunity to interpret the Fair Housing Act, as applied to the zoning process, so that the Congressional objective to achieve equal housing opportunities for all Americans will be realized.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 20 2002
OFFICE OF THE CLERK

No. 01-1269

IN THE

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, *et al.*,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE, AARP, THE CATHOLIC COMMISSION OF SUMMIT COUNTY, OHIO AND THE NORTHEAST OHIO AMERICAN FRIENDS SERVICE COMMITTEE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*

The National Fair Housing Alliance ("NFHA") is a non-profit corporation that represents approximately eighty-five private, non-profit fair housing organizations. NFHA was founded in 1988 to battle housing discrimination and to seek to ensure equal housing opportunity for all people. NFHA promotes equal housing, lending, and insurance opportunities through education, outreach, policy initiatives, advocacy and enforcement. Relying on the Fair Housing Act of 1968 ("FHA" or "Act"), NFHA and its members have undertaken important enforcement initiatives to eliminate discriminatory housing practices in cities and States across the nation.

AARP is the nation's leading organization for people age 50 years and older, with 35 million members. At the national and state level, AARP is actively involved in eliminating barriers to homeownership through research, advocacy, education and litigation. The FHA has been an important tool in AARP's pursuit of this goal and in its advocacy efforts to eliminate predatory lending practices.

The Catholic Commission of Summit County, Ohio is the social action arm of the diocese of Cleveland for Summit County. The Commission engages in public policy advocacy, community development, and educational efforts. Over the past 20 years, the Commission has formed seven affordable housing-related organizations, one of which provided a grant to help fund the housing development at issue in this case.

The Northeast Ohio American Friends Service Committee ("AFSC") is a Quaker-related social action organization committed to the principles of nonviolence and justice. AFSC opposes social, economic and political inequality, and

discrimination. AFSC seeks to change such conditions at the local level.[1]

The FHA reflects "a strong national commitment to promot[ing] integrated housing." *Linmark Assocs* v. *Township of Willingboro*, 431 U.S. 85, 95 (1977). Among the causes of residential segregation that Congress sought to eliminate was the refusal by predominantly white suburbs to accept low-income housing. This case illustrates the persistence of such refusals, and demonstrates why, some 34 years after the FHA was passed, "[h]ousing in the United States continues to be characterized by extremely high levels of racial segregation and unlawful discrimination." Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 2.1, at 2-1 (2001).

The evidence in this case reveals that city officials engaged in a concerted and discriminatory campaign to block construction of a low-income housing development, a campaign that included, but was by no means limited to, an eleventh-hour referendum petition. Invoking the First Amendment, petitioners ask this Court to immunize this illegal campaign from judicial scrutiny because it relied, in part, on use of the referendum process. If the Court accepts this invitation, it will offer a blue-print that other cities can use to evade the FHA and to frustrate its fundamental goals. Because *amici* are committed to ensuring the realization of those goals, they file this brief in support of respondents and urge affirmance, in part, of the judgment below.

SUMMARY OF ARGUMENT

1. Respondents do not, as petitioners claim, seek to hold city officials liable simply because they withheld building

---

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

permits after receiving a properly filed citizen petition. To the contrary, respondents offered evidence of a very different FHA violation below, and the lower court's judgment is that this evidence could sustain a finding of intentional discrimination. Viewing that evidence "'in the light most favorable'" to respondents, *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), a jury could find that city officials were not simply passive recipients of a citizen petition. Instead, the evidence reveals that city officials engaged in a concerted and discriminatory campaign to block respondents' housing development by, among other things, prompting an unprecedented (and invalid) petition drive, then aiding and abetting that drive through a series of discretionary acts to ensure that their "approval" of the development would never take effect. Based on this evidence, a jury could properly conclude that the decision to withhold the permits was simply the intended outcome of a broader and illegal campaign.

Evidence concerning citizen opposition to the development is plainly relevant to determining whether city officials undertook this campaign in order to appease the disciminatory animus of their constituents, as this Court has made clear in numerous decisions, including *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Use of such evidence is also fully consistent with the First Amendment. Petitioners' arguments concerning the chilling effect of any inquiry into citizen motivation ignore the city's opportunity to show that it acted for proper reasons. This Court, moreover, has never suggested that the First Amendment bars inquiries into whether legislators acted to appease discriminatory sentiment, and has recognized that protected speech can provide evidence of intent. *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993).

The sweeping prohibition on evidence of discriminatory intent that petitioners advocate would render the promises of the Equal Protection Clause and the FHA illusory.

Expressions of racial and other forms of discrimination are not entitled to preferential "breathing space," and city officials cannot escape liability for giving effect to such animus simply because they did so by relying, in part, on a petition drive. If petitioners have legitimate reasons for their conduct, they should explain them to a jury. They should not be allowed to invoke the First Amendment to immunize their official conduct from all judicial scrutiny.

2. This case provides no occasion for this Court to decide whether the FHA permits a finding of liability based on disparate impact analysis. Respondents did not pursue a true disparate impact claim below, and have now formally abandoned this theory. This Court should not decide the question in the absence of an adversarial presentation of the issues.

Further, the facts of this case do not state a disparate impact claim. The only facially neutral rule respondents challenged was the local law that stayed approval of respondents' site plan once the referendum petition was filed. This was the first and only time the provision has ever blocked approval of a site plan. A single application of the "automatic stay" provision does not afford a sufficient evidentiary basis for finding that this law has an unjustified disparate impact on protected persons. *Watson* v. *Forth Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

3. If the Court nevertheless chooses to address the issue, it should rule that disparate impact analysis is a valid basis for imposing liability under the FHA. The FHA uses the same operative language as Title VII, which this Court long ago held permits a finding of liability based on disparate impact. Linguistic consistency, as well as the shared remedial purposes of the two laws, compels the conclusion that the FHA also includes a disparate impact cause of action. Indeed, the circuit courts have unanimously so held.

This construction of the Act is confirmed by its legislative history. In seeking to promote integrated residential housing, proponents of the FHA recognized that segregation stemmed in part from ostensibly neutral laws and governmental practices, and they sought to undo the effects of those laws and practices. In addition, they recognized that proving intentional discrimination would often be extremely difficult. Recognition of a disparate impact cause of action is thus essential to achieving the goals of the FHA. Indeed, when it amended the Act in 1988, Congress knew that courts had uniformly recognized such a cause of action, and it necessarily ratified that construction by preserving the Act's operative language.

Finally, even if the language, purpose and history of the Act did not compel recognition of a disparate impact cause of action, this Court should defer to the views of the agencies charged with administering and implementing the law, all of which have found that the FHA permits a finding of liability based on disparate impact.

I. THE LOWER COURT PROPERLY REVERSED THE GRANT OF SUMMARY JUDGMENT TO PETITIONERS.

Viewed in the light most favorable to respondents, the evidence shows that petitioners were not passive observers of citizen democracy in action, but instead prompted and facilitated a petition drive as part of a discriminatory campaign to block respondents' housing development. This evidence is sufficient to sustain a finding of intentional discrimination. Permitting a city to be held liable for such conduct is wholly consistent with this Court's precedents and poses no threat to any First Amendment rights.

A. The Evidence, Viewed Most Favorably To Respondents, Would Support A Finding Of Intentional Discrimination By City Officials.

To establish a prima facie case of intentional discrimination under the Equal Protection Clause and the FHA, a plaintiff need only show that "a discriminatory purpose has been a motivating factor" in the challenged action *Arlington Heights*, 429 U.S. at 265-66. In reviewing the evidence bearing on this central issue, the lower court was not restricted to considering only the motivation of the city engineer who declined to issue the building permit, as petitioners contend, Pet. Br. at 12. Rather, the court was obligated to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Here, a wealth of direct and circumstantial evidence would allow a reasonable juror to conclude that the city engineer's refusal to issue the building permits was the intended result of a concerted campaign by city officials to give effect to their own discriminatory animus and that of their constituents. The lower court's judgment that respondents' evidence is sufficient to state a prima facie case of intentional discrimination was plainly correct, and should be affirmed. See *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 625 n.11 (1986) (this Court "reviews judgments, not opinions") (internal quotation marks omitted).

From the outset, respondents encountered a remarkable level of opposition to their development. Before even voting on the development, city planners requested unprecedented accommodations from respondents, including the construction of an eleven-foot earth and brick barrier to shield adjacent property.[2] Tr. Prelim. Inj. Hr'g ("Tr.") 47; Sixth Circuit J.A. ("App.") 152-54, 966-67. And while approval of a site plan is

[2] One council member testified that she could not recall any other instance where a developer was asked to build such a barrier. *See* J.A. 49.

ordinarily a routine matter, respondents' site plan was the subject of three separate, and quite heated, public meetings. Prior to several of these meetings, moreover, city officials urged residents to attend to express their strong opposition to the development. Tr. 135-37, 271-74; App. 488-84.

As a result, many citizens spoke out vehemently against the development in language that a reasonable fact-finder could interpret as veiled racism. One resident objected that "[w]e have got our ghetto[]" already, while another, who later helped lead the referendum drive, warned of the "kind of element [that] is going to be moving in there, just like you have on Prange Drive," a reference to the only development in Cuyahoga Falls with a significant African American population. J.A. 40, 139; Tr. 270, 182-85, 316. Other residents expressed concerns that "there will be a different class of people living there," that Cuyahoga Falls would be "downgrading itself," and that the development would attract crime and "boom boxes," J.A. 40, 44, 144, 162, comments typical of racial stereotyping. See David Cole, *No Equal Justice: Race And Class in the American Criminal Justice System* 34, 42 (1999).[3]

Echoing what he perceived to be "the mood of the community," Mayor Robart also expressed opposition in terms indicative of discriminatory animus. He argued that the development represented the same type of "social engineering that brought us busing," and referred to a newspaper article entitled "Stuck in the Ghetto," which discussed problems with Section 8 housing. J.A. 189. Mayor Robart also agreed with the comments of a state representative who attended a city council meeting and argued that "condensing *these*

[3] Racial animus could also be fairly inferred from the threatening behavior of some opponents of the development. One threatened to throw respondent Steven Boone out a window, while several others followed him to his car after a public meeting Tr. 37 – menacing conduct not typically prompted by concerns over a development's impact on sewer or storm water drainage systems. Pet. Br. at 16.

individuals in one place . . . just breeds problems." App. 917-20 (emphasis added).

In addition, there is evidence that opponents of the development were motivated by unlawful discrimination against families. At a meeting of the planning commission, Council Member George Potts explained that residents were concerned that the development would "potentially have a lot of children" and that its lifestyle would therefore differ from that of a nearby retirement community. App. 479; J.A. 37. The city's planning director explained that the commission requested the unprecedented barrier surrounding the development because "this project would be a larger family type project." J.A. 98. Residents repeatedly expressed concerns about the number of children that would live in Pleasant Meadows. *Id.* at 140, 163-64. One asked respondents, "Are your little kids going to shut up right at sunset?" *Id.* at 44. And at the meeting to organize the referendum petition, residents expressed concern about the children that would move in to the development. Tr. 295.

City officials responded to these sentiments by providing assurances that they were doing everything in their power to block the development. Council Member Sandy Rubino told residents that he had "looked under every rock" for a legitimate reason to vote against the development. J.A. 144. Council President Barbara White said she and other city officials had looked for "any legal shred that we could hang onto so that we could reject this project." *Id.* at 150.

As part of these efforts, city officials first conceived the idea of a "citizen-led" referendum, then went to extraordinary lengths to ensure that it prevented the site plan from taking effect. It was the city's law director, not citizens, who first raised the possibility of a referendum to block the development at a council meeting on March 4, 1996. J.A. 174. At this same meeting, Mayor Robart urged the council to delay its vote on whether to approve the site plan "two weeks, a month" or longer in order to "buy time." App. 967.

After the meeting, the mayor met with the citizens who ultimately conducted the petition drive, and consulted with them about the name of the group. *Id.* at 1174.

At a March 18, 1996 meeting, Mayor Robart again urged vigorous opposition to the development, J.A. 155, and suggested the city engage in a legal war of attrition with respondents that would delay approval until the development became financially untenable.[4] At the conclusion of that meeting, the council again declined to approve the site plan, despite its recognition that there was no valid legal ground for rejecting it. *Id.* at 145-46, 148-49. Instead, it tabled a vote to give the legal department another chance to see "if there was any possible reason . . . that [the City] could turn [the project] down legally." App. 1265. Council President Barbara White wrote to the city's law department, asking whether the council could reject the site plan without incurring liability and whether a referendum could block the development. *Id.* at 974-75.

After the law department confirmed that there was no legitimate ground for rejecting the site plan, the council approved it by a slim majority on April 1, 1996. Tr. 43. Shortly thereafter, the referendum leaders held their first public meeting, which three council members and Mayor Robart attended. *Id.* at 292. Although the council members were asked to leave, the mayor remained and expressed support for the petition drive. Docket Entry R. ("R.") Exh. D, at 84-88; App. 903, 1174. The day after the meeting, the mayor wrote the city's law department to ask how many signatures were needed. App. 979. Although the law department provides legal advice to the council, not those seeking to block council actions, *id.* at 816-17, it provided the requested information.

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[4] The Mayor explained that the city's law department is paid no matter what it is doing, whereas respondents would have to hire lawyers and decide how long they "want to pursue this thing, given the fact that we all know that somewhere along the line there is a deadline." App. 945.

Before the site plan ordinance took effect, the mayor directed the city's service director to issue a memorandum requesting that no building permits be issued until further notice. R. 34, Exh. A. The service director issued the memorandum to the city engineer, who had never seen such a directive for any other development. Tr. 193-94. Following receipt of the referendum petition, the law department advised that any building permits should be held in abeyance. R. 34, Exh. A.

Despite the "automatic stay" effected by the filing of the petition, the council still could have authorized issuance of the permits by passing an emergency ordinance with the support of eight of eleven council members. The council failed to do so, however, when, on May 28th, three council members again voted against the ordinance, and another two members abstained. Tr. 196. As a result, the city engineer declined to issue the permits.

Viewing these facts and all reasonable inferences to be drawn from them in the light most favorable to respondents, a reasonable juror could find that city officials, motivated either by their own discriminatory animus or a desire to appease that of their constituents, mounted a concerted campaign to block respondents' development. As part of that campaign, they repeatedly departed from the normal procedural and substantive standards for site plan approval by delaying votes in order to search for non-zoning bases for rejecting the development. See *Arlington Heights*, 429 U.S. at 267 & n.17 ("[d]epartures from the normal procedural sequence" and failure to rely on factors "usually considered important by the decisionmaker" are strong indications "that improper purposes are playing a role"). Unable to find such grounds, they prompted and then abetted a petition drive cynically designed to provide a "nondiscretionary" basis for discriminating against African Americans and families with children. This view of the city's conduct is buttressed by the facts that (1) no other site plan had ever been the subject of a

referendum petition, let alone a petition proposed and openly encouraged by city officials after consultations with city lawyers, (2) the council had approved an even larger development (that did not involve subsidized housing) for the exact same site three years earlier, J.A. 43, 137, App. 148, and (3) denial of respondents' smaller development had a disproportionate impact on protected groups. See *Arlington Heights*, 429 U.S. at 266 (fact that official action bears more heavily on protected groups may serve as circumstantial evidence of discriminatory intent).[5]

Contrary to the claims of petitioners and the United States, a jury reviewing this evidence would not be required to consider only those actions city officials took after the petition was filed. See Pet. Br. at 11-15; Brief of the United States as *Amicus Curiae* Supporting Petitioners ("U.S. Br.") at 27-32. Even if city officials lacked discretion to issue building permits after the petition was filed, a jury could reasonably find that respondents' injury resulted from a coordinated campaign of discretionary (and impermissibly motivated) actions through which city officials ensured that a petition drive they had prompted and abetted would preclude their site plan approval from ever taking effect. Cf. *Kirksey* v. *City of Jackson, Miss.*, 669 F.2d 316, 317 (5th Cir. 1982) (per curiam) ("[t]he referendum process may not be used to legitimate an unconstitutional act"). In short, city officials cannot escape liability for blocking respondent's development by claiming that their "hands were tied," when the evidence shows that they told citizens to buy the rope, explained how to tie it, and stalled long enough to make sure the knot was firmly in place in time.

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[5] The fact that the mayor himself did not "organize[] the petition drive" or "secure[] meeting places" for it, Pet. App. 128a-129a, does not preclude a finding that city officials collectively prompted and abetted the drive in order to give effect to the discriminatory animus of vocal citizens.

B. The Discriminatory Motives Of Citizens Are Relevant To Determining Whether Officials Sought To Give Effect To Those Motives.

Tacitly recognizing the sufficiency of respondents' showing, petitioners try to foreclose consideration of key pieces of the evidence against them. Thus, they argue that courts may consider only the discriminatory motives of the officials themselves, not the animus of the citizens those officials represent. Contrary to petitioners' claims, however, numerous decisions of this Court, including *Arlington Heights*, confirm the relevance of evidence of citizen animus.

This Court has long held that government officials engage in intentional discrimination by giving effect to the discriminatory motives of the electorate. See *City of Cleburne, Tex.* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (city officials violated Equal Protection Clause by blocking construction of home for the mentally retarded in response to community prejudice); *Palmore* v. *Sidoti*, 466 U.S. 429 (1984) (state court violated 14th amendment by taking into account societal prejudice when it declined custody of child to white mother who had married African American man); *Buchanan* v. *Warley*, 245 U.S. 60 (1917) (city officials violated equal protection when they banned African Americans from buying property in majority-white neighborhoods to prevent racial conflicts).[6] Some "[p]rivate biases may be outside the reach of the law, but the law

[6] *See also United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1226 (2d Cir. 1987) (city officials can be liable under the 14th Amendment if "racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive"); *Smith* v. *Town of Clarkton, N.C.*, 682 F.2d 1055, 1063 (4th Cir. 1982) (city officials violated Equal Protection Clause and FHA by blocking low-income housing development in response to citizen opposition "motivated in significant part by racial considerations"); *Kirksey*, 669 F.2d at 316-17 (motivation of the electorate may be considered in a proper case).

cannot, directly or indirectly, give them effect." *Palmore*, 466 U.S. at 433.

Nothing in *Arlington Heights* precludes courts from considering evidence that city officials sought to appease the discriminatory animus of citizens. Indeed, in *Arlington Heights* itself, this Court *approved* the lower courts' inquiry into whether city officials had refused to rezone based on the racially motivated comments of some opponents of the housing project. 429 U.S. at 268-69. By recounting the lower courts' conclusion that the evidence in that case did not warrant a finding that the officials had been so motivated, the Court confirmed the relevance of the inquiry; nowhere did it fault the lower courts for considering such evidence.[7]

The evidence in this case, of course, is starkly different from that in *Arlington Heights*. There, city officials handled the rezoning request "according to the usual procedures" and "focused almost exclusively on the zoning aspects of the [rezoning] petition." *Id.* at 269-70. Here, city officials repeatedly departed from their usual procedures – imposing unprecedented conditions, tabling routine votes, issuing unprecedented directives, and proposing and abetting an unprecedented referendum – and openly searched for non-zoning grounds in order to reject the development.

Nor are the comments of opponents of the development rendered legally irrelevant because city officials "approved" the site plan. Pet. Br. at 13-14. This Court has explained that "the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal

[7] *Arlington Heights* also forecloses petitioners' claim that citizen comments are relevant only where city officials act "'for the *sole purpose* of appeasing racially motivated opponents.'" Pet. Br. at 14 (emphasis added) (quoting *United States* v. *Birmingham*, 538 F. Supp. 819, 827 (E.D. Mich. 1982)). Because government officials rarely take any action "motivated solely by a single concern," a plaintiff need only show that "a discriminatory purpose has been a motivating factor" in the challenged action. *Arlington Heights*, 429 U.S. at 265-66.

Protection Clause . . . and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne*, 473 U.S. at 448. It is equally plain that the city cannot avoid these twin strictures through a discriminatory campaign that *combines* aspects of both types of proscribed conduct. Viewed in the light most favorable to respondents, the evidence shows that city officials "defer[red] to the [discriminatory] wishes or objections of the body politic" by repeatedly delaying a vote on the site plan in order to abet a petition drive that would "order" the very action that city officials themselves could not take. To bar consideration of citizen comments because city officials nominally approved an ordinance only after devising a scheme to render that approval ineffective would indulge the most artificial of pretexts, and reward the most cynical of subterfuges.

C. Consideration Of Citizen Comments Does Not Threaten Any First Amendment Rights.

Petitioners and their *amici* argue that the use of citizen comments as evidence of intentional discrimination threatens core First Amendment values. They claim that the use of such evidence threatens to saddle a city with liability based on the expressions of a handful of individuals, and will chill core political activity by officials and citizens, who will fear that their valid motives for voting, signing petitions or speaking against measures will be tainted by association with those who vote, sign or speak for illegal reasons. See Pet. Br. at 16-19; U.S. Br. at 17. These claims are groundless.

1. The Governing Evidentiary Framework Protects The City From Improper Imputation Of Discriminatory Animus.

In arguing that judicial scrutiny of citizen comments will result in cities being held liable for the views of a few citizens, petitioners ignore the evidentiary framework that governs intentional discrimination claims. Under *Arlington Heights*, courts must conduct a "sensitive inquiry" into many factors, including the impact of the challenged action, its historical background, and the sequence of events leading up to the action. See 429 U.S. at 266-68. Statements by citizens and officials are only part of the broad picture that the factfinder must consider. Indeed, in concluding that the evidence "at least, raise[s] a genuine issue of material fact as to whether the City . . . gave effect to the racial bias of its citizens," the Sixth Circuit made clear that it considered all "the circumstances surrounding the opposition to the project," not just the comments of a few citizens. See *Buckeye Comty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 637 (6th Cir. 2001).

Petitioners also ignore the opportunity they will have to rebut respondents' view of the evidence and to come forward with evidence to show that the actions described above were not taken for improper reasons. Thus, petitioners could offer arguments or evidence to show that they delayed votes, imposed unprecedented conditions and prompted an unprecedented petition drive not because they sought to give effect to discriminatory animus, but because they concluded that current zoning laws fail to accommodate legitimate concerns over density, noise, pollution and traffic. Cf. *Arlington Heights*, 429 U.S. at 270 (evidence showed that officials focused on appropriate zoning factors and neighbors' reliance on zoning policies). If, after a full and fair trial, the fact-finder nevertheless imposes liability, it will not be because a mere "one ten-thousandth of the City's population" was motivated by racial or other improper animus. Pet. Br. at 16. Instead, liability will rest on a successful showing that city officials gave effect to impermissible discrimination, and that their explanations for their actions are mere pretexts.[8] Cf.

[8] Respondents might succeed in proving pretext, for example, by showing that the larger complex the city approved would have entailed the same or greater impacts on sewers, school systems, traffic and pollution,

Texas Dep't of Cmty. Affairs v. *Burdine*, 450 U.S. 248, 253, 255 n.10 (1981) (Title VII plaintiff pursuing an intentional discrimination claim must prove that "legitimate reasons offered by the defendant were . . . a pretext for discrimination").

In short, the city was not precluded from rejecting the development once one citizen expressed racial opposition. Pet. Br. at 19-20. Petitioners will have a full opportunity to show that they acted for legitimate reasons. They cannot escape their burden of making that showing, however, by barring consideration of evidence demonstrating that they in fact sought to appease the discriminatory animus of citizens.

2. Considered Within The Governing Framework, Protected Speech May Be Used As Evidence Of Discriminatory Intent.

Because petitioners have a chance to prove the propriety of their actions, arguments concerning "the potential for chilling First Amendment rights," U.S. Br. at 17, amount, in reality, to an extraordinary plea for protection against the mere chance of an erroneous finding of intentional discrimination, reached after a full and fair trial. But the "breathing space" petitioners and their *amici* seek for expressions of discriminatory animus, *id.* at 19, is not justified by the First Amendment, and is wholly inconsistent with this Court's decisions. To protect the "critically important rights" that both the "Fair Housing Act and, *a fortiori*, the Fourteenth Amendment safeguard," *id.* at 20, this Court has long permitted judicial inquiries into the intent of legislators and the electorate alike. It has likewise recognized that protected speech can provide direct evidence of discriminatory animus, and that evidentiary use of such speech to prove intent is constitutionally permissible. To hold otherwise would eviscerate the promise of the Equal Protection Clause and the FHA.

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and by pointing to the statements of Mayor Robart, who emphasized that the issue was *not* density. J.A. 154.

This Court has frequently endorsed inquiries into the motives of legislators and voters to determine whether legislation was enacted for an unlawful purpose. Indeed, as noted above, in *Arlington Heights*, the Court approved judicial examination of the motives of city officials whose zoning decision had a disproportionate adverse impact on minorities. 429 U.S. at 268-69. Similarly, the Court has held that when a facially neutral referendum is challenged under the Equal Protection Clause, "an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations." *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484-85 (1982). Even when rejecting such challenges, the Court has made clear that "a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose." *Crawford* v. *Board of Educ.*, 458 U.S. 527, 544 (1982); see also *id.* at 545 (applying *Arlington Heights* factors to facially neutral referendum and finding "no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose"); *James* v. *Valtierra*, 402 U.S. 137, 141 (1971) (the "record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.").

In none of these cases did the Court suggest that the First Amendment posed any barrier to the required judicial inquiry into intent. To the contrary, in *Arlington Heights*, the Court mandated a "sensitive inquiry into such circumstantial *and direct* evidence of intent as may be available." 429 U.S. at 266 (emphasis added). Statements by legislators and voters espousing discriminatory views or a desire to appease such views is the most "direct evidence" of discriminatory intent available. Indeed, the Court noted that, in some cases, the members of an administrative or legislative body "might be called to the stand at trial to testify concerning the purpose of the official action." *Id.* at 268. The Court recognized that

"inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," *id.* at 268 n.18, and that some testimony might be barred by privilege, *id.* at 268 (citing *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (Speech or Debate Clause) and *United States* v. *Nixon*, 418 U.S. 683 (1974) (executive privilege)). Notably, however, the Court did *not* include the First Amendment among its list of possible impediments to inquiries into legislative intent – despite its recognition, just two paragraphs later, that such inquiries may include an examination of whether officials were motivated by the discriminatory views of citizens, *id.* at 268-69.

In fact, in other contexts, the Court has made clear that the First Amendment does not prohibit use of speech – even core political speech – as evidence of motive or intent. In *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), a criminal defendant argued that his sentence was enhanced in violation of the First Amendment because prosecutors used statements he had made to prove that his crime was motivated by racial bias. In rejecting this argument, the Court explained that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." *Id.* at 489. To support its holding, the Court cited *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), a civil case in which statements made by the defendant employer were admissible to prove discrimination. See *Mitchell*, 508 U.S. at 490. The Court also cited *Haupt* v. *United States*, 330 U.S. 631 (1947), a case in which political statements made by the defendant were admissible as evidence of intent in his trial for treason. See *Mitchell*, 508 U.S. at 489.

In short, the First Amendment does not preclude use of discriminatory statements by citizens as evidence that city officials sought to give effect to the discriminatory animus of

their constituents. Certainly, such statements do not deserve more "breathing space" than other core political speech that the Court has held admissible to prove intent. Indeed, neither petitioners nor their *amici* explain why expressions of racial and other forms of illegal discriminatory animus should be accorded special evidentiary status, when such animus cannot provide a valid basis for legislative action. See *Arlington Heights*, 429 U.S. at 266; *City of Cleburne*, 473 U.S. at 448.

To hold otherwise, moreover, would severely undermine the protections of the Equal Protection Clause and the FHA. City officials will rarely, if ever, openly acknowledge that they are acting to give effect to the illegal animus of citizens. To foreclose use of citizen expressions of such animus as evidence that officials were so motivated, therefore, would essentially immunize conduct that violates both the Constitution and a federal statute designed to vindicate "'a policy that Congress considered to be of the highest importance.'" *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

Indeed, this case provides a virtual blueprint for how cities can evade the FHA. On respondents' view of the facts, which must be accepted for present purposes, city officials prompted and then abetted a petition drive that simultaneously effectuated the city's discriminatory goal while ostensibly purging it of any impermissible taint. Petitioners and their *amici* now ask this Court to bless this plan of evasion, arguing that the petition drive precludes all liability for the "nondiscretionary" withholding of building permits, that it precludes any inquiry into the motivations of citizens who led the drive, or that, at a minimum, it permits a finding of liability only if the petition itself is a "sham."[9] This Court

[9] Respondents' evidence would permit a finding that the petition *was* a "sham," in that it was part of a concerted campaign to discriminate. But the test the United States proposes would ignore the role of officials in that campaign, and would focus instead solely on whether the referendum was "'objectively baseless.'" U.S. Br. at 18. Because "hypothetical" or

should reject this invitation. If petitioners have legitimate reasons for their conduct, they should explain those reasons to a jury. They should not be allowed to use a petition drive as part of a concerted campaign of discrimination, and then to invoke the First Amendment to immunize that campaign from judicial scrutiny and liability.

II. THIS CASE DOES NOT PRESENT THE QUESTION WHETHER LIABILITY UNDER THE FHA MAY BE BASED ON DISPARATE IMPACT.

This case presents no occasion for the Court to decide whether the FHA includes a disparate impact cause of action. Respondents have disavowed such a claim in this Court, and the United States has declined to address the issue. In all events, the facts of this case do not give rise to a disparate impact claim. Accordingly, this Court should vacate the lower court's holding that respondents were entitled to pursue a disparate impact claim under the FHA.

Although respondents made a "disparate impact" argument below, they did not identify a facially neutral *practice or policy*, adopted without discriminatory intent, that had a disproportionate effect on protected groups. To the contrary, even as part of their "disparate impact" analysis, respondents claimed that city officials blocked the development through a series of ad hoc actions designed to "comply[] with the discriminatory wishes of" citizens. Appellants' Br. at 25. Respondents have now confirmed that they are not pursuing a disparate impact claim.

As a result, this Court lacks the benefit of an adversarial presentation by parties with "an actual, as opposed to a professed, stake" in the question presented. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring). Indeed, the United States, which administers

"possible" nondiscriminatory grounds for opposing a housing development can always be postulated, no discriminatory scheme that made use of a facially neutral referendum would ever be illegal under this test.

and enforces various aspects of the FHA, see *infra* at 28-29, has declined to address whether the FHA includes a disparate impact cause of action. U.S. Br. at 12 n.1. For prudential reasons alone, therefore, this Court should decline to address the issue at this time.

In any event, the facts of this case do not give rise to such a claim. "[T]he necessary premise of the disparate impact approach is that some . . . *practice[]*, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 U.S. at 987 (emphasis added); see also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971). The discriminatory impact of a facially neutral practice or policy is established by examining its "operation" over a range of applications.[10]

The predicates for disparate impact analysis are absent here. The only neutral rule that contributed to respondents' FHA injury was the provision of the city charter that stayed approval of respondents' site plan when the referendum petition was filed. Because the referendum provision had never before been invoked to block approval of a site plan, respondents could show only that a *single application* of a facially neutral law bore more heavily on protected groups. A single application of the city's "automatic stay" provision simply does not afford a sufficient evidentiary basis for determining whether this facially neutral rule operates as the functional equivalent of intentional discrimination. See Schwemm, *supra*, § 10:6, at 10-43 (disparate impact "is not

[10] *See, e.g.*, *Griggs*, 401 U.S. at 429 (aptitude test and high school diploma requirement rendered "a markedly disproportionate number of Negroes" ineligible for job); *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977) (height requirement excluded one-third of all women, but less than 2% of all men); *Connecticut* v. *Teal*, 457 U.S. 440, 443-44 (1982) (hundreds of test results showing disproportionate pass rates of blacks and whites established disparate impact of written examination for promotions).

appropriate for claims that are based on a single act or decision").[11]

In short, because there is no evidence that current housing segregation is attributable to the city's facially neutral "automatic stay" provision, the fact that members of a protected class are adversely affected by the first and only application of that law does not provide a sufficient evidentiary basis for application of disparate impact analysis.

III. DISPARATE IMPACT IS A VALID BASIS FOR IMPOSING LIABILITY UNDER THE FHA.

If this Court reaches the issue, it should hold that the FHA authorizes a disparate impact cause of action. The FHA employs precisely the same operative language as Title VII of the Civil Rights Act of 1964, and this Court long ago concluded that this language permits a finding of unlawful discrimination based on appropriate evidence of disparate impact. Linguistic consistency, and the related aims of the two laws, compel the same construction of the FHA, as every court of appeals has concluded. The propriety of such a construction is confirmed by the Act's legislative history, by Congress's tacit ratification, in 1988, of judicial adoption of disparate impact analysis under the FHA, and by agency implementation of the Act.

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[11] In some cases, courts have entertained disparate impact challenges to a "single decision" that simply affirmed a policy that had long exerted a segregative effect on the town. *See, e.g., Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15, 17 (1988) (town's refusal to amend zoning law restricted private construction of multifamily housing to a largely minority area, thereby "significantly perpetuat[ing] segregation in the Town.") (internal quotation marks omitted). Such disparate impact challenges are really leveled at the long-standing policies, not isolated applications of laws that have not contributed to the segregated nature of the town.

A. The Text And Purpose Of The FHA Compel The Conclusion That It Permits A Finding Of Liability Based On Disparate Impact Analysis.

Section 3604(a) of the FHA makes it illegal to "make unavailable or deny[] a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The FHA's operative "because of" language is identical to the operative language of Title VII, which bars discrimination against an employee "because of such individual's race, color, religion, sex, or national origin." 42 § U.S.C. 2000e-2(a)-(d). In *Griggs*, this Court held that Title VII prohibits not only intentional discrimination, but also employment practices that have unjustified discriminatory effects. "Linguistic consistency requires" that the operative language of the FHA be given the same meaning as "the same operative language" in Title VII. *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1893 (2002) (phrase "arising under" in 28 U.S.C. § 1338 must have same meaning that Court gave that phrase in § 1331) (internal quotation marks omitted).

Far more than "linguistic consistency," however, compels such a construction of the FHA. In concluding that Title VII authorizes liability based on unjustified disparate impact, this Court focused on the broad purposes underlying that statute, observing that it was intended "to achieve equality of employment opportunities and remove barriers that have operated in the past" to hurt minority employees. *Griggs*, 401 U.S. at 429-30. The same broad remedial objectives prompted passage of the FHA. The Act declares that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This Court has frequently recognized "the broad remedial intent of Congress embodied in the Act," *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380 (1982), which reflects "a strong national commitment to promot[ing] integrated housing," *Linmark Associates*, 431

U.S. at 95, and seeks to achieve that goal by outlawing "a broad range of discriminatory practices," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968).

It is precisely because the FHA and Title VII share the same basic purpose of promoting equal opportunity for members of protected groups that this Court has looked to its interpretation of Title VII to give meaning to provisions of the FHA. For example, in *Trafficante*, 409 U.S. at 208-09, the Court interpreted the phrase "'person aggrieved'" in the FHA by citing a case that construed a similar phrase in Title VII. Cf. *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 389-90 (1982) (14th Amendment's discriminatory purpose standard controls claims under the 1866 Civil Rights Act because the laws are "legislative cousins" and it would be "incongruous to construe" them in a "markedly different" manner).

In light of the identical language and purposes of the two laws, the circuit courts have unanimously concluded that the FHA, like Title VII, includes a disparate impact cause of action.[12] These rulings, moreover, reflect a judicial recognition that the FHA could not achieve its broad aim of ensuring equal housing opportunities if it did not reach many public as well as private rules and practices that, however neutral they may appear, operate in a manner that is "functionally equivalent to intentional discrimination."

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[12] *E.g.*, *Macone* v. *Town of Wakefield*, 277 F.3d 1, 5-7 (1st Cir. 2002); *Bangerter* v. *Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Jackson* v. *Okaloosa County, Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith* v. *Volpe*, 858 F.2d 467, 482-84 (9th Cir. 1988); *Huntington Branch, NAACP* v. *Town of Huntington*, 844 F.2d 926, 934-36 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Betsey* v. *Turtle Creek Assocs.*, 736 F.2d 983, 986-88 (4th Cir. 1984); *United States* v. *City of Parma, Ohio*, 661 F.2d 562, 564-65, 576 (6th Cir. 1981); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146-49 (3d Cir. 1977); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1288-90 (7th Cir. 1977); *United States* v. *City of Black Jack, Mo.*, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

Watson, 487 U.S. at 987. Thus, the lower courts have permitted disparate impact claims against appraisal practices, *Hanson* v. *Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986), insurance redlining practices, *National Fair Housing Alliance, Inc.* v. *Prudential Insurance Co. of America*, 208 F. Supp. 2d 46, 58-61 (D.D.C. 2002), and (before familial status protection was included in the Act), adults-only rental policies, *Betsey* v. *Turtle Creek Associates*, 736 F.2d 983, 986-88 (4th Cir. 1984), that effectively made housing "unavailable" to minorities. Without a disparate impact cause of action, these and many other barriers to fair housing could not be eliminated.

B. The Legislative History Confirms That Congress Intended To Provide A Disparate Impact Claim Under The FHA.

Although the Congress that enacted the 1968 FHA was primarily concerned with eliminating intentional discrimination – as it had been four years earlier when it adopted Title VII – proponents of the Act also wanted to undo the discriminatory effects of municipal laws and practices and to ensure that government could not use such laws to circumvent the Act.

Congress adopted the FHA in the wake of the highly publicized report by the National Advisory Commission on Civil Disorders, which had warned that the "Nation is moving toward two societies, one black, one white – separate and unequal." See *Report of the National Advisory Commission on Civil Disorders* 1, 13 (1968). Proponents of the FHA repeatedly pointed out that the facially neutral practices of suburban governments were a principal cause of residential segregation. Thus, the Act's principal sponsor, Senator Mondale, explained that blacks were unable to move to white suburbs because of the "refusal by suburbs and other communities to accept low-income housing. . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been *the policies and practices* of

agencies of government at all levels." 114 Cong. Rec. 2277 (1968) (emphasis added). Similarly, Senator Brooke noted that blacks could not move to better neighborhoods because they were "surrounded by a pattern of discrimination based on individual prejudice, often institutionalized by business and industry, and Government *practices*." *Id.* at 2526 (emphasis added). Of particular relevance, Senator Mondale noted that, after this Court had prohibited explicitly racial zoning laws in *Buchanan* v. *Warley*, 245 U.S. 60 (1917), "[l]ocal ordinances *with the same effect*, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted." 114 Cong. Rec. at 2699 (emphasis added).

Proponents of the FHA plainly intended to eliminate these causes of residential segregation. Senator Mondale stated that it "seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo *the effects* of these past State and Federal unconstitutionally discriminatory actions." *Id.* (emphasis added). Indeed, because Congress had undoubted power to proscribe intentional discrimination by States, Senator Mondale would have had no reason to comment on the constitutionality of a fair housing law aimed at state governments unless that law sought to reach the effects of neutral laws and practices.

The legislative history also demonstrates that Congress was aware of the difficulty of proving discriminatory intent. Senator Baker introduced an amendment that would have exempted from liability any homeowner who engaged a real estate agent "without indicating any preference, limitation or discrimination based on race . . . , or an intention to make any such preference, limitation or discrimination." *Id.* at 5214. A number of the bill's proponents objected that the amendment would make proof of discrimination difficult in all but the most blatant cases. Senator Dominick argued that the amendment would "increase[] the opportunity for discrimination," *id.* at 5220, and Senator Percy stated that the amendment

"would require proof that the single homeowner had specified racial preference. I maintain that proof would be impossible to produce." *Id.* at 5216. See also *id.* at 5218, 5220-21 (remarks of Senators Mondale and Hart regarding the difficulty of proving discriminatory intent). In response to these concerns, the Baker amendment was defeated. *Id.* at 5221-22.

In short, proponents of the FHA clearly recognized that residential segregation stemmed in part from ostensibly neutral laws and governmental practices, and they sought to undo the effects of those laws and practices. These facts, together with the widespread recognition that evidence of overt discrimination would often be difficult to uncover, confirm that Congress intended to provide a disparate impact cause of action under the FHA. Indeed, the contrary conclusion would effectively condemn Congress as having adopted a measure manifestly incapable of achieving its intended aims.

C. The Fair Housing Amendments Act Of 1988 Tacitly Approved Disparate Impact Analysis.

Prior to passage of the 1988 Fair Housing Amendments Act ("FHAA"), all eight of the circuit courts that had addressed the issue had concluded that the FHA included a disparate impact cause of action. See note 12, *supra*. Congress was aware of this judicial consensus, and necessarily endorsed it by amending the law without changing the operative "because of" language.

When Congress amends a statute, it is "presumed to have known of [the] settled judicial treatment" of that law. *Edelman* v. *Lynchburg Coll.*, 122 S. Ct. 1145, 1152 (2002) (Title VII case); see also *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-98 (1979). Here, the legislative history of the FHAA shows that Congress had actual knowledge of the FHA impact decisions, see *Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 100 Cong.

529-57 (1987). Indeed, the House Report expressly cited a number of circuit decisions employing disparate impact analysis. See H.R. Rep. No. 100-711, at 21 & n.52, 90-91 (1988) (citing decisions of Second, Fourth and Ninth Circuits).

Aware that illegal racial discrimination in housing was continuing, Congress strengthened enforcement of the Act, see *id.* at 16-18, 33-40, and made no change to the Act's operative "because of" language. In fact, the House rejected an attempt to eliminate disparate impact challenges to local zoning decisions, see *id.* at 89 (describing failed attempt to require showing of "intent to discriminate" in such challenges),[13] and the FHAA's principal sponsor in the Senate explained that "Congress accepted th[e] consistent judicial interpretation" endorsing a disparate impact analysis and "contemplated no such intent requirement." 134 Cong. Rec. 23711-12 (1988) (remarks of Senator Kennedy). In light of this history, the FHAA must be seen as "tacit congressional approval" of the prior judicial decisions endorsing the impact standard. See *Edelman*, 122 S. Ct. at 1151-52; see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed "to adopt [prior judicial] interpretation when it re-enacts a statute without change").

D. Administrative Implementation Of The FHA Supports A Disparate Impact Standard.

Finally, the various agencies charged with implementing and administering the FHA have embraced use of disparate

[13] The House Report also expressly endorsed a disparate impact analysis in cases involving the newly protected class of familial status. It explained that reasonable limitations on the number of occupants per unit would be allowed to continue "as long as they . . . *did not operate to discriminate* on the basis of race, color, religion, sex, national origin, handicap or familial status." H.R. Rep. No. 100-711, at 31 (emphasis supplied); *see also id.* at 21 & n.52 (noting that familial status discrimination "often has a racially discriminatory effect" on minorities and approving cases upholding FHA disparate impact challenges to "adults-only" housing requirements).

impact analysis. Most significantly, the Secretary of Housing and Urban Development ("HUD"), who has "[t]he authority and responsibility for administering th[e] Act," 42 U.S.C. § 3608(a), has endorsed disparate impact. See *HUD* v. *Mountain Side Mobile Estates*, 2 Fair Hous.-Fair Lend. Rptr. (P-H) ¶ 25,053, at 25,492-93 (HUD Sec'y), *on remand*, *id.* ¶ 25,057 (HUD Sec'y 1993). Thus, even if the statute itself did not resolve the issue whether disparate impact is a valid basis of liability – and, as *amici* have just explained, it plainly does – an administrative construction adopted through adjudication is entitled to the highest degree of deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230-31 & n.12 (2001).[14]

In addition, the Assistant Secretary for Fair Housing and Equal Opportunity has told Congress that "[t]he standards to determine discrimination [in home insurance under the FHA] – as in all other covered areas – will be based on the principles of overt discrimination, disparate treatment, and disparate impact." See *Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103 Cong. 52 (1994). Similarly, HUD's handbook for its FHA enforcement staff endorses impact theory.[15] Thus, even if *Chevron* deference did not apply to the Secretary's interpretation, the view of FHA law

[14] This conclusion is not altered by the fact that the Tenth Circuit reversed this decision on other grounds. *Mountain Side Mobile Estates P'ship* v. *Secretary of HUD*, 56 F.3d 1243 (10th Cir. 1995). In fact, the Tenth Circuit expressly endorsed the Secretary's view that the FHA includes a disparate impact cause of action. *Id.* at 1250-51.

[15] *See* HUD, No. 8024.01, *Title VIII Complaint Intake, Investigation, and Conciliation Handbook*, 3-25 (1995) (housing policy violates the FHA if it has a discriminatory motive or "a disproportionately negative effect upon [protected] persons."); *id.* pt. 7-12, at 7-20 to 7-23 (identifying "overt discrimination, disparate treatment, and disparate impact" as types of illegal discrimination under the FHA); *id.* pt. 5-10-A-4, at 5-57 (facially neutral land-use ordinances may violate the FHA if they have a "disparate impact").

reflected in these various HUD pronouncements is entitled to *Skidmore* deference. *Mead*, 533 U.S. at 227-28.

Other agencies have also interpreted the FHA to include a disparate impact cause of action. As part of its enforcement responsibilities under the FHA,[16] the Justice Department has often successfully urged the lower courts to adopt an impact standard in FHA cases, particularly those dealing with exclusionary land-use decisions by local governments. See, *e.g.*, *Yonkers*, 837 F.2d at 1217; *City of Parma*, 661 F.2d at 564-65, 576; *United States* v. *Mitchell*, 580 F.2d 789, 791-92 (5th Cir. 1978); *City of Black Jack*, 508 F.2d at 1184-85. Moreover, in 1994, HUD, Justice, and eight other federal agencies that regulate financial institutions, including the Federal Reserve Board and the Office of the Comptroller of the Currency, adopted a joint "Policy Statement on Discrimination in Lending" recognizing that proof of disparate impact is sufficient to establish a violation of the FHA. See 59 Fed. Reg. 18266, 18269 (Apr. 15, 1994). Although these agencies lack the interstitial lawmaking power delegated to the Secretary of HUD, their consistent views are also entitled to *Skidmore* deference, and confirm the propriety of the Secretary's determination that the FHA provides a disparate impact cause of action.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

---

[16] *See, e.g.*, 42 U.S.C. § 3614 (Attorney General may file "pattern or practice" and "general public importance" cases); *id.* § 3610(g)(2)(C) (requiring HUD to refer administrative complaints that involve zoning or other land-use laws or ordinances to the Attorney General for appropriate action under § 3614).

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November 20, 2002

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NO. 01-1269

Supreme Court, U.S.
FILED
NOV 19 2002
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF CUYAHOGA FALLS, *ET AL.*,
PETITIONERS,

V.

BUCKEYE COMMUNITY HOPE FOUNDATION, *ET AL.*,
RESPONDENTS.

On Writ Of Certiorari To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF NATIONAL MULTI HOUSING COUNCIL, NATIONAL LEASED HOUSING ASSOCIATION, NATIONAL ASSOCIATION OF INDUSTRIAL OFFICE PROPERTIES AND NATIONAL APARTMENT ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici Curiae are trade associations whose members own real property.[1] Based in Washington, D.C., the National Multi Housing Council ("NMHC") is a national association representing the interests of the larger and most prominent apartment firms in the United States. NHMC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NHMC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living.

The National Leased Housing Association ("NLHA") is a national organization dedicated to the provision and maintenance of affordable rental housing for all Americans. NLHA is a vital and effective advocate for 550 member organizations, including developers, owners, managers, public housing authorities, nonprofit sponsors and syndicators involved in government related rental housing.

The National Association of Industrial and Office Properties ("NAIOP") is the trade association for developers, owners, investors and asset managers in industrial, office and related commercial real estate. Founded in 1967, NAIOP is comprised of more than 10,000 members in 48 North American chapters and provides networking opportunities, educational programs, research on trends and innovations and strong legislative representation.

---

[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

The National Apartment Association ("NAA") is the largest national federation of state and local apartment associations. NAA is comprised of 155 affiliates and represents more than 30,000 professionals who own and manage more than 4.5 million apartments. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment.

Amici and their members have a stake in ensuring that real property owners have a substantive Due Process right to rely on the predictable rules and criteria of existing zoning regulations. They are concerned that, if in individual cases local governments are permitted to condition the administrative implementation of existing zoning regulations on referendum approval, this will erode landowners' property rights and impede their ability to make educated judgments about the risks inherent in valuable land use opportunities.

Amici also are concerned about the development of rental housing in the United States, and their members participate in federal government programs designed to meet the need for affordable housing. Forty percent (40%) of affordable housing rental units in the country are occupied by households with children. As direct participants in the affordable housing market, *amici* are familiar with both the history of discrimination against families with children and minorities and the laws designed to root out that discrimination.[2] *Amici* thus have an interest in the interpretation of the Due Process Clause, which provides a

[2] *Amici* understand that Respondents do not raise a separate disparate impact claim and have informed us that they do not view their complaint as addressing such a claim. *Amici* will take no position with regard to whether a disparate impact claim is cognizable under the Fair Housing Act.

constitutional limitation on the ability of opponents to block the development of affordable housing.

SUMMARY OF ARGUMENT

The national economy and the rights of millions of Americans are negatively affected when local governments arbitrarily abuse land use policies to block the construction of apartments and affordable housing in a particular community. Although apartments and affordable housing developments provide communities with great benefits,[3] there remains a bias against their expansion, and irrational discrimination has contributed to a severe national shortage of affordable housing.

The Fair Housing Act and other laws prohibit discrimination in housing. Therefore, municipalities may not overtly reject affordable housing on the grounds that its intended residents will include a disproportionate number of families with children and minorities.

A local government should not be able to do indirectly what it cannot do directly – arbitrarily prevent the development of affordable housing that is consistent with existing zoning laws and presents no threat to the general safety or welfare. This Court has always held that real property owners have property rights cognizable under the Due Process Clause of the Fourteenth Amendment. The Cuyahoga City (the "City") Charter provision violated those rights by permitting voters to decide whether Respondent

[3] *See* Brochure by National Multi Housing Council and National Apartment Association, *Creating Successful Communities: A New Housing Paradigm* (Jan. 17, 2002) *at* http://www.nmhc.org/Content/ServeFile.cfm?FileID=2501. Copies of this document and all other internet-based documents cited herein have been lodged with the Clerk of the Court.

property owner would be permitted to benefit from the City's existing zoning regulations.

Landowners do not enjoy property at the sufferance of the electorate. Voters may not be granted an administrative veto that is unconstrained by standards imposed pursuant to legislative policy. Rather, a developer who selects property based on the existing zoning law, complies with all existing zoning requirements, and obtains the City's approval of a site plan as consistent with the zoning code has a right to the benefit of those zoning regulations. A law subjecting property rights to referenda allows voters to circumvent those rights. Such a standardless system of administrative veto by referendum would prevent landowners from making informed decisions about the intended use of their property, and deprive them of fundamental property rights. The Due Process Clause prohibits such arbitrary and capricious results.

ARGUMENT

I. The Critical Need For, And History Of Discrimination Against, Affordable Housing Demands That Landowners Be Protected Against Arbitrary Government Action

A. There Is A Need For Affordable Housing, Which Is Important To The National Economy

In December 2000, Congress established the bipartisan Millennial Housing Commission to examine, analyze and explore "the importance of housing, particularly affordable housing . . . to the infrastructure of the United States" and "the various methods for increasing the role of the private sector in providing affordable housing. . . ." Public Law 106-74, § 206(b), 113 Stat. 1047 (amended

1999). On May 30, 2002, the Commission issued a letter to Congress and its report concluding:

> First, housing matters. . . . The development of housing has a major impact on the national economy and the economic growth and health of regions and communities. Housing is inextricably linked to access to jobs and healthy communities and the social behavior of the families who occupy it. The failure to achieve adequate housing leads to significant societal costs. Second, there is simply not enough affordable housing. The inadequacy of supply increases dramatically as one moves down the ladder of family earnings. The challenge is most acute for rental housing in high-cost areas, and the most egregious problem is for the very poor . . . .
>
> The importance of helping more Americans satisfy these objectives cannot be overstated. . . . Very particularly, it improves life outcomes for children. In the process, it reduces a host of costly social and economic problems that place enormous strains on the nation's education, public health, social service, law enforcement, criminal justice, and welfare systems.

Letter From MHC Co-Chairs Susan Molinari and Richard Ravitch to Congress and Report of the Bipartisan Millennial Housing Commission Appointed by the Congress of the United States 13 (May 30, 2002) *at* http://www.mhc.gov ("*MHC Report*").

Other evidence suggests that a significant number of low and moderate income households are struggling to find affordable housing. Data from the Census Bureau's 1999 American Housing Survey indicate that more than one-half (1/2) of apartment renters with incomes of less than half of the area median face severe housing cost burdens (pay more than fifty percent (50%) of their income for rent and utilities). Many more renters face moderate housing cost burdens (thirty to fifty percent (30-50%) of their income for housing costs). *See* NMHC, *Housing Affordability: The Apartment Universe* (Aug. 27, 2002) *at* ttp://www.nmhc.org/Content/ServeContent.cfm?IssueID=382&ContentItemID=2591.

Moreover, many families with earnings significantly higher than the full-time, minimum wage equivalent also face moderate and severe housing affordability problems. Consider household heads working in retail sales (with a median income of $15,940), licensed nursing ($27,850), or law enforcement ($37,560). Among the 11.8 million households with earnings between the median for retail sales workers and the median for licensed nurses, fully thirty-four percent (34%) had moderate housing cost burdens, and ten percent (10%) had severe problems. Among the 11.4 million with earnings between the medians for licensed nurses and law enforcement, nineteen percent (19%) had moderate problems, and five percent (5%) had severe problems. *MHC Report* 21 *at* http://www.nhc.gov.

Congress has recognized that every American should have access to decent and affordable housing regardless of whether the housing is owned or rented, and has enacted measures designed to counteract the shortage of affordable housing. Housing production programs, such as the federal Low Income Housing Tax Credit ("LIHTC"), provide housing at lower rental rates to residents and are an

important part of the national effort to develop affordable housing.

This is the program that Respondent Buckeye Community Hope Foundation utilized to develop its property in the City of Cuyahoga Falls, Ohio. Under the program, institutional investors become the principal partners in the partnership that develops the property in consideration of receiving federal income tax credits. The developer advances fees and expenses and arranges for other financing for which it earns a development fee and other financial benefits flowing from the ownership and operation of the apartment community. The Internal Revenue Code establishes a variety of requirements which must be met in order for investors to receive the tax credits. These requirements include regulation of the income level of residents and the amount of rents that may be charged. It is estimated that the LIHTC and other project-based subsidies have been responsible for about twenty to twenty-five percent (20-25%) of the new apartment stock developed in the last five years. *See* NMHC, *Research Notes: Affordable Rental Housing* (May 4, 2001) *at* http://www.nmhc.org/Content/ServeContent.cfm?IssueID=382&ContentItemID=1494.

B. Bias Against Apartments Is Unfounded

Contributing to the shortage of affordable housing is a bias against apartments. A common misperception is that homeowners, in contrast to renters, make neighborhoods more stable, are more committed to neighborhood improvement, and are financially better off because they are owners. Unfortunately, though the assertions are common, they are more myth than fact. In reality, apartment residents are more socially engaged than single-family homeowners. They are equally involved in community groups and

similarly attached to their communities and religious institutions. *See* NHMC, *Research Notes: Apartment Residents as Citizens and Neighbors* (Jun. 25, 1999) *at* http://www.nmhc.org/Content/ServeContent.cfm?ContentItemID=545.

Some of the often overlooked benefits of apartment homes include:

* they promote balanced suburban development;
* they help revitalize urban neighborhoods;
* they conserve land and promote open space;
* they use the municipal infrastructure more efficiently than single family homes;
* they reduce the demand for new roads and school construction; and
* they provide necessary housing for millions of public service employees, such as teachers, nurses and public safety officials.

In addition, apartment development stimulates the national economy. The nation's 16.1 million apartment units (in buildings of at least five units) are worth approximately $1.3 trillion. *See* Kenneth T. Rosen, *et al., Apartments: A $1.3 Trillion Market* (Nov. 2001 Revised) *at* http://www.nmhc.org/Content/ServeFile.cfm?FileID=1158. Rental apartments are a critical component of housing. Renter households constitute one-third (1/3) of the households in the United States (approximately 36 million households). Thirty-five percent (35%) of households in metropolitan areas rent, and twenty-four percent (24%) of households in

rural areas rent. *See* National Low Income Housing Coalition: *Out of Reach 2002* (2002) *at* http://www.nlihc.org/oor2002/introduction.htm. According to the National Association of Home Builders, "the construction of 1000 apartment units generates:

* 1,030 full-time jobs in construction and construction-related industries;
* $32 million in wages; and
* $15.8 million in combined federal, state and local tax revenues and fees."

See NHMC, *Quick Facts: New Construction* (2001) *at* http://www.nmhc.org/Content/ServeContent.cfm?IssueID=253&ContentItemID=145.

One of the most common objections developers face is the belief that new apartments will overburden local school districts. An analysis of the U. S. Census Bureau's 2001 American Housing Survey suggests otherwise. On average, rental apartments house fewer school-age children (0.31 per household) than single-family residences (0.53 per household). In fact, single family owners are significantly more likely to have school age children than are apartment renters. The differences are even greater for residences built since 1990, which is most relevant to the current impact of new construction of apartment in communities. On average there are 64 school age children for every 100 new owner-occupied single family houses, but only 29 children for every 100 new apartments. *See* NMHC, *Research Notes: Apartments and Schools* (July 11, 2002) *at* http://www.nmhc.org/Content/ServeContent.cfm?ContentItemID=827&IssueID=80. Generally, there is no empirical support for the all too common strategy of barring or limiting apartment construction to relieve pressure on local school systems.

C. There Is A History Of Discrimination In Affordable Housing

One cause of the affordable housing shortage is a national stigma against development that primarily will house families with children and minorities. Local development policies, escalating land costs and development barriers all have had a profound impact on rental housing production. "Not-in-my back-yard" (NIMBY) attitudes and exclusionary local government policies, procedures and actions make it difficult to expand the supply of low and moderate income housing. *See* NMHC, *Research Notes: Affordable Rental Housing at* http://www.nmhc.org. Irrational discrimination against renters also exacerbates housing problems for moderate income persons. The arbitrary and capricious denial of property rights to build apartment housing not only harms the developer, but also low and moderate income Americans and the national economy.

While prejudices against affordable housing occupants historically were overt, communities have become more adept at concealing their true motives. The devices used to accomplish such discrimination now are more subtle. Crosses are not burned. Facilities are not segregated by ordinance. Instead, a permit or administrative vote is delayed until available financing is lost; irrelevant and costly studies are demanded of developers; novel zoning issues arise; or elected officials organize citizens to protest at a hearing or to vote through referendums to block housing designed for occupancy by minorities and families with children.

D. Local Governments Should Not Be Able To Conceal Discrimination Through Arbitrary Decision-Making

Of course, the Fair Housing Act prohibits local governments from overtly discriminating against the development of affordable housing inhabited by families with children and minorities. 42 U.S.C. § 3601, *et seq.* (2002). *See, e.g., United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981). Indeed, developers are entitled to enforce the Fair Housing Act, and may bring a claim under the Act to protect their rights from unlawful discrimination. *See, e.g., Silver Sage Partners v. City of Desert Hot Springs*, 251 F.3d 814 (9th Cir. 2001); *San Pedro Hotel Co., v. City of Los Angeles*, 159 F.3d 470 (9th Cir. 1998).[4]

However, beyond the Fair Housing Act, owners have property rights that cannot be infringed upon by local government. A municipality should not be able to do indirectly what the Fair Housing Act prohibits it from doing directly – prevent the development of affordable housing for reasons unrelated to the public health, safety, morals or general welfare. Affordable housing opponents cannot be

---

[4] In *Silver Sage*, the court held that developers and others were entitled to $3.1 million in damages because of the municipality's violation of the Fair Housing Act. Plaintiff had alleged that the city had intentionally failed to certify a project's compliance with local law requirements because members of the city council did not want a project populated by minority children. *See Silver Sage*, 251 F.3d at 819-21.

In *San Pedro*, the court upheld the finding that the city had violated the Fair Housing Act by failing to make the routine approval of the use of funds previously allocated to enable the sale of a property to a not-for-profit developer of housing for the mentally disabled. The court pointed out that the violation was not the failure to approve the loan but that the City improperly interfered with the loan by breaching its duty to act in a nondiscriminatory manner. *See San Pedro*, 159 F.3d at 475-76.

allowed to utilize arbitrary procedures to achieve cloaked objectives. The Due Process Clause does not permit the abrogation of a landowner's rights under existing zoning laws in a referendum that provides no standards or guidelines for review of an administrative action.

Such is the case here. The drafters of the referendum petition and city officials had lobbied the City Council to reject the Respondents' site plan, not because of some legitimate public interest, or because it contravened a public purpose, but because the intended residents of the affordable housing were families with children and minorities. When the City Council passed the Ordinance approving the Respondents' site plan, these citizens and city officials channeled their efforts into a referendum petition that would improperly circumvent the administrative adjudication of the site plan's conformance with existing zoning laws. Such arbitrary procedures violate the Due Process rights of property owners, who are entitled to rely on the benefit of existing zoning regulations. Local government cannot circumvent these rights because of objections to the development of affordable housing.

II. The Issue For The Court Is Whether The City, In Giving Effect To The Referendum And Denying Respondents The Benefit Of A Generally-Applicable Zoning Plan, Acted Arbitrarily And Capriciously In Violation Of Due Process

The Constitution states that no "State [may] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Due Process Clause of the Fourteenth Amendment confers both procedural and substantive rights. *See United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697 (1987); *Daniels v. Williams*, 474 U.S. 327, 331, 106

S. Ct. 662, 664, 88 L. Ed. 2d 662 (1986); *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437 (1982); *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 2705-06, 33 L. Ed. 2d 548 (1972). The substantive component of Due Process protections recognizes "that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed...." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (citations omitted).

The Due Process Clause of the Fourteenth Amendment guarantees land owners the substantive right to be free from arbitrary or irrational governmental actions which infringe on its rights. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263, 97 S. Ct. 555, 562, 50 L. Ed. 2d 450 (1977) (recognizing landowners' right "to be free of arbitrary or irrational" land use decisions); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 369, 47 S. Ct. 114, 121, 71 L. Ed. 2d 303 (1926) (if a land use regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," it must be struck down). Government may not interfere with the general rights of a landowner unless the restriction bears a "substantial relation to the public health, safety, morals, or general welfare." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S. Ct. 50, 51-52, 73 L. Ed. 210 (1928) (quotation omitted). The "critical constitutional inquiry" is whether the governmental restriction "produces arbitrary or capricious results." *City of Eastlake v. Forest Enters,. Inc.*, 426 U.S. 668, 675 n.10, 96 S. Ct. 2358, 2363 n.10, 49 L. Ed. 2d 132 (1976).

A. An Owner of Real Property Has A Property Interest Cognizable Under The Due Process Clause

The first step in analyzing a substantive due process claim is to determine whether there is a property interest that is cognizable under the Fourteenth Amendment's Due Process Clause. The Court always has held that ownership of real property is a property interest sufficient to invoke Due Process. *See Village of Euclid*, 272 U.S. at 386-87, 47 S. Ct. at 118, 71 L. Ed. 2d 303. The government may place restrictions on the right to use that property, but this does not defeat a real property owner's property interest in the land itself. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165-66 (7th Cir. 1994). Although the real property owner may not have the right to develop the land for any intended use, the owner retains the right to apply for an amendment or variance to accommodate his individual needs, and as Justice Stevens recognized, "the opportunity to apply for an amendment [to an existing zoning plan] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment." *City of Eastlake*, 426 U.S. at 682-83, 96 S. Ct. at 2366, 49 L. Ed. 2d 132 (Stevens, J., dissenting).

In *Roth*, the Court held that government benefits may qualify as property within the meaning of the Due Process Clause if there is "a legitimate claim of entitlement" to the benefit, and thus expanded Due Process protections beyond that which is owned to, in some limited circumstances, that which is sought. 408 U.S. at 577, 92 S. Ct. at 2709, 33 L. Ed. 2d 548; *DeBlasio v. Zoning Bd. of Adjustment for Township of West Amwell*, 53 F.3d 592, 601 n.9 (3d Cir.), *cert. denied*, 516 U.S. 937, 116 S. Ct. 352, 133 L. Ed. 2d 247 (1995). According to the Court, the property interests in such government benefits "are created and their dimensions

are defined by *existing* rules or understandings that stem from an independent source such as state law -- rules or understandings that *secure* certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 507, 92 S. Ct. at 2709, 33 L. Ed. 2d 548 (emphasis added).

Although there is some disagreement in the federal courts about whether *Roth* applies to land regulation cases, *see Amicus* Brief of Pacific Legal Foundation and the Center for Equal Opportunity at 24 & n.4-5 (collecting cases), the *Roth* entitlement inquiry is properly confined to government benefits cases. A landowner has an indisputable interest in the land he owns that is unaffected by any governmental restriction on the use of that property. *See Village of Euclid*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 2d 303; *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989) (questioning "why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test"). In *City of Eastlake*, the Court impliedly recognized the distinction between property interests in land ownership and government benefits when it assumed that a real estate developer who had applied for a zoning change had a sufficient property interest to warrant due process protections. 426 U.S. at 673-75; 96 S. Ct. at 2361-62, 49 L. Ed. 2d 132.

There is no question that Respondents owned the land at issue in this case; therefore, Respondents have a property interest deserving of constitutional protection. Moreover, even under the *Roth* entitlement theory, Respondents had clear entitlement to a building permit and thus had a property interest within the meaning of the Fourteenth Amendment. Respondents had a valid site plan, which the City Planning Commission determined conformed to the existing zoning plan and was in harmony with the public interest, and which the City Council approved. As

the Sixth Circuit concluded, Respondents' "property interest was securely vested upon the City's affirmative representation that the site plan conformed with the existing zoning regulations as reflected by the City's approval, by ordinance, of the site plan." *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 643 (6th Cir. 2001), *cert. granted in part*, 122 S. Ct. 2618, 153 L. Ed. 2d 802 (2002).

B. A Landowner's Right To Due Process Is Violated When An Administrative Referendum Deprives The Landowner Of The Benefit Of An Existing Zoning Regulation

The Court must determine whether a City Charter provision lawfully may grant voters the unqualified right to deny a landowner the benefit of existing zoning regulations by submitting an Ordinance approving a land use to a public vote. The Due Process Clause places limits on the manner in which citizens can veto administrative land use decisions that adjudicate rights under generalized zoning ordinances. A City may not subject its administration of land use policy to a voter consent process that is uncontrolled by any standard or rule governing the exercise of that power. Such a law, by definition, violates Due Process because it invites arbitrary and capricious results.

1. The Respondents' Site Plan Met All The Requirements Of The Zoning Law

The City had an established zoning ordinance with generalized requirements. Respondents' land was zoned for multifamily use, and the Planning Commission concluded that Respondents' site plan complied with the zoning requirements. Pursuant to the City Charter, the City Council approved the Planning Commission's application of existing

zoning regulations to Respondents' site plan and passed an Ordinance[5] approving the site plan. The City Charter also injected an additional layer of review – it provided for its citizens the power to approve or reject at the polls any ordinance or resolution passed by the Council by requesting that the ordinance be submitted to the voters as a referendum. *Buckeye Cmty*, 263 F.3d at 632. Before the ordinance approving Respondents' site plan was to take effect, a petition was submitted that requested a referendum to approve or reject the ordinance. As a result, the Respondents were unable to obtain a building permit and the referendum deprived the Respondents of the benefit of the Council's approval through the ordinance and the generalized zoning scheme.[6]

2. The Court Has Recognized The Difference Between Citizen Consent Provisions Involving Legislative And Administrative Determinations

The issue of whether citizen consent provisions violate the Fourteenth Amendment Due Process Clause is not new to this Court. On four occasions, the Court has considered whether citizens' freedom to reject a land use proposal is repugnant to the Due Process Clause of the

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[5] Whether or not the form of an "ordinance" is required to "approve" the site plan, that is what was used by the City Council. Since this was an administrative matter, the Council no doubt could have just voted to "approve" the site plan. By using the form of an "ordinance," the council could not turn what is an administrative action into a legislative one.

[6] Respondents' Due Process claim is not dependent on the validity of the referendum under state law. Even if state law authorized voter approval of the City Council's administrative land use decisions (which it does not in this case), the referendum nevertheless would violate Respondents' Due Process rights.

Fourteenth Amendment. In the first of these decisions, *Eubank v. City of Richmond*, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912), the Court struck down a Richmond ordinance that empowered two-thirds (2/3) of the property-owners on any block to establish, within a specified range, a building set-back line. The Court ruled that the ordinance violated Due Process, stating:

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest and even capriciously.

Id. at 143-44; 33 S. Ct. at 77, 57 L. Ed. 156. The Court found it "hard to understand how public comfort or convenience, much less public health can be promoted by a line which may be so variously disposed." *Id.* at 144, 33 S. Ct. at 77, 57 L. Ed. 156.

Five years later, in *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 37 S. Ct. 189, 61 L. Ed. 472 (1917), the Court considered an ordinance that prohibited the construction of billboards in residential areas, but permitted neighbors to waive that prohibition and consent to the use. The Court concluded that the neighborhood consent provision was a "provision affecting the enforcement of laws and ordinances." *Id.* at 531, 37 S. Ct. at 192, 61 L. Ed. 472. The ordinance did not implicate Due Process rights because it allowed the intended beneficiaries of the ordinance to waive the otherwise applicable legislative limitation, and thus expanded property rights rather than denigrating the use

or depreciating the value of land. According to the Court, "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property." *Id.* at 530, 37 S. Ct. at 191, 61 L. Ed. 472.

In the third of these cases, the Court considered a Seattle zoning ordinance that allowed a home for the aged poor to be built in a particular area, but only with "the written consent . . . of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." *Roberge*, 278 U.S. at 118, 49 S. Ct. at 50-51, 73 L. Ed. 210. A property owner sought a permit to erect a home for the aged poor, and the legislative body found that the construction and maintenance of the home was in harmony with the public interest and within the general scope and plan of the zoning ordinance. When the landowner failed to furnish the consents required in the ordinance, the permit was denied. Again, the Court struck down the ordinance:

> The [ordinance] proposes to give the owners of less than one-half the land within 400 feet of the proposed building authority – uncontrolled by any standard or rule prescribed by legislative action – to prevent the [owner] from using its land for the proposed home. . . . [The citizens] are free to withhold consent for selfish reasons or arbitrarily and may subject the [owner] to their will or caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."

Id. at 121-22, 49 S. Ct. at 52, 73 L. Ed. 210. The Court found it particularly troubling that the landowner was "bound

by the decision or inaction of such owners.... [T]heir failure to give consent is final." *Id.* at 122, 49 S. Ct. at 52, 73 L. Ed. at 210.

Eubank and *Roberge* remain good law today. In *City of Eastlake*, 426 U.S. at 677-78, 96 S. Ct. at 3363-64, 49 L. Ed. 2d 132 (1976), the Court reaffirmed both *Eubank* and *Roberge* and confirmed that Due Process prohibits a law which grants citizens the unbridled administrative decision-making power to adjudicate property rights.

In *City of Eastlake*, the Court upheld a city charter provision granting citizens a voice on questions of public policy by requiring that any proposed changes in land use be ratified by fifty-five percent (55%) of the votes cast in a referendum. In rejecting the developer's due process challenge, the Court explained that "[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment *when applied to a rezoning ordinance*." *Id.* at 679, 96 S. Ct. at 2364-365, 49 L. Ed. 2d 132 (emphasis added). Because the rezoning decision was properly reserved to the people, it was constitutional to permit the voters to decide whether to effectuate the plaintiff's proposed rezoning plan. *Id.* Distinguishing between acts that legislate land use policies and acts that administer existing land use policies, the Court stated:

> The situation presented here is not one of a zoning action denigrating the use or depreciating the value of land; instead, it involves an effort to change a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought . . . . Thus, this case involves an owner's seeking approval of a new use free

> from the restrictions attached to the land when it was acquired.

Id. at 679 n.13, 96 S. Ct. at 2365 n.13, 49 L. Ed. 2d 132. The Court also noted that the provision was not constitutionally infirm because the landowner could seek variances if the decision caused unnecessary hardship. *Id.*

3. Citizen Consent Provisions That Enable Citizens To Reject Administrative Determinations Violate Due Process

It thus is clear that a legislature may allow its citizens to make a generalized zoning decision, or decide, in the valid exercise of its police powers, to restrict a land use manifestly subject to regulation, and then condition the imposition of such restriction upon voter approval. *See Cusack*, 242 U.S. at 531, 37 S. Ct. at 192, 61 L. Ed. 472. *See also New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S. Ct. 403, 411, 58 L. Ed. 2d 361 (1978) ("an otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection"); *City of Eastlake*, 426 U.S. at 677-78 n.12, 96 S.Ct. at 2364 n.12, 49 L. Ed. 2d 132. The determinative question is whether the voter consent goes only toward the modification of restrictions that have already been validly framed by the legislature and that reflect a clear expression of governmental policy.

A referendum can empower voters to act in this legislative capacity, and thereby give the general public direct political participation. However, a referendum on administration of an ordinance, which does not guide voters with standards, ignores the legislature's will and deprives a landowner at the voter's whim of the right to the benefit of a generally-applicable zoning ordinance. Where there are no

such standards, an election to decide whether a particular landowner should be entitled, in an administrative adjudication, to benefit from a generalized zoning ordinance:

> exemplifies popular justice, the mode by which an Athenian jury, without deliberation, without instruction or control by professional judges, without possibility of correction on appeal, and without the assistance of lawyers, condemned Socrates. . . . There is no standard [here] to guide voters . . . We need not attribute frivolous motives to them. Just as we do not trust jurors to deliberate without instructions, so we should be concerned that an elector free-for-all might result in serious errors . . .
>
> This will not bother anyone who believes that the democratic process should be left completely unhindered by law. But that is not the theory of the Constitution. An individual's life, liberty, and property are not held or enjoyed at the sufferance of the electorate. . . .

Club Misty, Inc. v. Laski, 208 F.3d 615, 621 (7th Cir. 2000) (referenda empowering voters to resolve legislative actions fundamentally different than referenda to resolve administrative/judicial actions).

As Judge Posner recognized in *Club Misty*, a law authorizing an "electoral free-for-all" in an administrative adjudication violates Due Process for the same reason that a law authorizing a state agency to resolve permit issues without regard to the expression of governmental policy expressed in the governing zoning laws is constitutionally

infirm. There is no enforcement of legislative will, but rather there is arbitrary decision-making untied to any legislative standard, and without regard to the public interest. Any such attempt to deny a landowner the benefit of a generalized ordinance would violate the landowner's Due Process rights by undermining the legislature's intent and bearing no relation to the public health, safety, morals or general welfare. *Roberge*, 278 U.S. at 121, 49 S. Ct. at 51, 73 L. Ed. 210.

4. The Referendum That Denied Respondents The Benefit Of Existing Zoning Regulations Violated Due Process

The rule that a municipality may reserve to its citizens the right to establish zoning laws of general applicability is not implicated here. The referendum did not ask voters to establish zoning policy through community legislation. The referendum did not ask the electorate to make a decision based on general, legislative grounds, or to grant an exception to an existing zoning structure. That would involve a legislative determination that *City of Eastlake* makes clear is properly reserved for popular vote.

Because the referendum at issue here does not call for a legislative determination, the Court need not decide whether a municipality violates substantive Due Process rights when it conditions affordable housing development permits on voter approval. *See James v. Valtierra*, 402 U.S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971). Here the City expressed no such legislative policy against affordable housing. Instead, the City's expression of legislative policy about affordable housing is reflected in the City's generalized zoning laws, which unquestionably permit the development of affordable housing.

The referendum here challenged an administrative decision adjudicating whether the Respondents' site plan conformed with *existing* zoning codes that permitted the development of affordable housing. The zoning ordinance made a general determination affecting Respondents' property rights, and the referendum allowed voters to determine on an individual basis whether to allow development consistent with that generalized ordinance. This administrative adjudication did not expand or create new use rights; rather, it determined whether Respondents could use the rights they already had under an existing zoning scheme.

The referendum interfered with Respondents' right to develop the property even though the Ordinance approving the land use had not yet become effective. The City had already decided to permit land use of the proposed type. Respondents' right to benefit from the zoning scheme already existed when the City gave effect to the referendum. The referendum thus questioned whether to allow Respondents to enjoy rights established under a previously adopted zoning plan, and thereby blocked the implementation of the existing zoning provisions authorizing the land use. The electorate, acting in an administrative capacity, cannot defeat property rights granted in a zoning ordinance enacted by the legislative branch. The state's use of administrative processes to terminate Respondents' right to benefit from generally applicable state zoning laws deprived Respondents of a protected property interest.

The referendum subjected the Respondents' enjoyment of these existing rights to the voters' whims, prevented Respondents from the benefit of the existing uniform laws, and diminished the use of the Respondents' land. In *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th

Cir. Unit B 1981), *cert. denied*, 456 U.S. 973, 102 S. Ct. 2236, 72 L. Ed. 2d 847 (1982), the Fifth Circuit struck down a law that similarly impacted a landowners' Due Process rights. In *Wheeler*, the developers submitted a plan that satisfied the existing zoning ordinance, and the City of Pleasant Grove issued a building permit for the construction of an apartment complex. *Id.* The citizens responded by submitting a referendum demonstrating "an overwhelming resistance to the proposed apartment complex." *Id.* The city then adopted a new ordinance which forbade the building of new apartments, thereby prohibiting the developers from constructing the apartment complex. *Id.* at 100. The Fifth Circuit found that the city's deference to the majority will in implementing the new ordinance had "no substantial relation to the public health, safety, morals, or general welfare," and thus was arbitrary and capricious and violated plaintiff's right to Due Process. *Id.* (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L. Ed. 303 (1926)).

As *Wheeler* and *City of Eastlake* make clear, a referendum affecting the enforcement of ordinances, like that present here, violates Due Process if it denigrates property rights. The City cannot leave to the discretion of the citizenry whether to give effect to a zoning ordinance that already is in place. The City may not require the Respondents to satisfy the requirements in the zoning code and then leave the ultimate decision to the whims of the electorate. The referendum is an improper exercise of administrative power that is repugnant to Due Process protections.

Moreover, the voter consent provision was not based on any articulated legislative policy, and there were no standards to govern the citizens' vote. A referendum is constitutionally infirm if it "creates no standard by which the

power thus given is to be exercised." *Eubank*, 226 U.S. at 143-44, 33 S. Ct. 77, 57 L. Ed. 156. A referendum may not allow voters to decide individual land use applications "uncontrolled by any standard or rule prescribed by legislative action." *See Roberge*, 278 U.S. at 122, 49 S. Ct. at 52, 73 L. Ed. 210. Here the voters had the right, unqualified by any legislative policy, and uncontrolled by any legal standard, to veto the City Council's determination that a particular land use is appropriate. A referendum cannot in this way allow voters to deny a landowner the benefit of the generalized zoning laws. "[A]dministrative decision-making [may not be] made potentially subservient to selfish or arbitrary motivations or the whims of local taste." *Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662, 666 (4th Cir. 1989).

Acknowledging this rule, the Sixth Circuit, in the case before this Court, relied on *TLC Development, Inc. v. Town of Branford*, 855 F. Supp. 555 (D. Conn. 1994). In *TLC*, a builder had requested a site plan which could only be denied "if it fail[ed] to comply with requirements already set forth in the zoning ... regulations." *Id.* at 557 (quoting Conn. Gen. Stat. § 8-3(g)). The Town of Branford nonetheless denied approval of the site plan because of reasons other than those specifically articulated by law. The Court found that "there was no basis in the law for the denial." *Id.* at 558. According to the Court:

> [A] town, through its Commission, cannot arbitrarily refuse to permit a landowner to use land if the proposed use comports with the uses permitted in the district in which the land is located. By articulating the uses permitted in a district, a town has fixed the uses which accommodate all the considerations permitted by the law in adopting a town plan. Once it has done so, a town cannot prevent a permitted use based on factors which might have been, or were, considered in deciding the uses permitted in the zoning district.

Id. In other words, once the zoning decision has been made, it would be arbitrary and irrational to deny a site plan which actually conforms to that zoning decision.

As the Court in *TLC* recognized, this type of citizen veto over an administrative land use decision that has been approved by the local government and explicitly found to conform to the local zoning scheme runs afoul of Due Process protections. When a local government has no rational basis or acts arbitrarily and capriciously in denying the right to develop, that constitutes a violation of substantive due process rights. Moreover, *City of Eastlake* makes clear that a provision placing administrative authority in the hands of the electorate does not remove the decision from Due Process inquiry: "If the substantive result of the referendum is arbitrary and capricious…then the fact that the voters wish it so would not save the restriction." 426 U.S. at 676, 96 S. Ct. at 2363, 49 L. Ed. 132.

The Sixth Circuit also recognized that the danger inherent in voter consent provisions involving administrative adjudications is that voters could utilize such an administrative referendum to "gang up" against a landowner who they do not like for reasons unrelated to any plausible public interest. A referendum allows for the "arbitrary targeting" of a "particular premises," and enables citizens to "gang up" on a particular landowner whose development project they dislike for "reasons unrelated to any plausible public interest," and thus prevent the development of a low-income housing project for reasons unrelated to the consideration of a site plan ordinance. *See Brookpark*

Entm't, Inc. v. Taft, 951 F.2d 710, 715 (6th Cir. 1991), *cert. denied*, 506 U.S. 820, 113 S. Ct. 68, 121 L. Ed. 2d 35 (1992). "This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent...." *Id.* at 716 (citation omitted).

A landowner must be able to expect that its submission of an acceptable site plan that conforms to an already-existing zoning code will result in a building permit. Respondents purchased property that was zoned for the intended purpose and incurred considerable expense in preparing a site plan. The site plan met all of the City ordinance requirements, the Planning Commission recommended its approval, and the City Council approved the site plan. Respondents had a protected property right to construct the planned housing development in accordance with the existing zoning laws. The City violated Respondents' Due Process rights when it submitted to referendum the City Council's approval of Respondents' site plan and the City Engineer consequently refused to issue Respondents a building permit to which they were entitled under the generalized ordinance. By giving effect to the referendum and denying Respondents the benefit of the site plan ordinance, when the Respondents had met all legal requirements for approval, the City impaired the exercise of the Respondents' existing rights and engaged in arbitrary and irrational behavior prohibited by the Due Process Clause of the Fourteenth Amendment. *Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210; *Eubank*, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (requiring the consent of property owners to allow building in accordance with zoning laws was repugnant to the Due Process Clause of the Fourteenth Amendment).

CONCLUSION

Respondents satisfied the applicable zoning requirements, and cannot be held hostage to voters' standardless decision-making. Otherwise, local communities could cloak discriminatory animus by divesting themselves of administrative constraints and subjecting landowners' property rights to popular will. This would produce arbitrary and capricious results, and severely inhibit the development of desperately needed affordable housing. Landowners do not hold their real property interests at the sufferance of the electorate. If local governments are permitted to subject the implementation of generally-applicable land use rules to the whims of the electorate, a landowner's property interest would be ephemeral indeed. *Amici* believe that the decision of the Sixth Circuit should be affirmed.

Dated: Nov. 20, 2002 Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 15 2002
OFFICE OF THE CLERK

(12)

No. 01-1269

In The

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, et al.,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,

Respondents.

-On a Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE RESPONDENTS

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OTHER

Bernard H. Siegan, *Property Rights* (Transaction Publishers 2001) 5

Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash Univ. Journal of Law & Policy 61 (2000) 15, 17

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James W. Ely, Jr., *The Guardian of Every Other Right, A Constitutional History of Property Rights* (Oxford University Press 2d ed. 1998).....5, 6

Kenneth B. Bley, Tina R. Axelrad, *In Search for Constitutionally Protected "Property" In Land-Use Law*, 29 Urb. Law. 251 (1997) 15

INTEREST OF *AMICUS*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the Respondents. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 208,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. It is therefore concerned with any judicial decision that affects the regulation of land development. Protecting our members' fundamental constitutional rights has long been an integral part of our activities.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a host of critical land regulation cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*,

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002); and *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *cert. granted*, 71 U.S.L.W. 3153 (U.S. Aug. 26, 2002) (No. 01-1243).

INTRODUCTION

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. This Court has developed an interpretation of the clause that protects one's basic substantive rights, in addition to the right to process. "Substantive due process" guarantees that a state cannot take away a person's life, liberty or property without appropriate governmental justification, regardless of the government's procedures. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (explaining that the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . ."); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (explaining that it is possible for a state to deprive property rights by unreasonable legislation); *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897) (recognizing that "liberty" means more than a person's right to be free from incarceration, but also to be free to "live and work where he will" and enter into proper contracts).

In analyzing Buckeye's due process claim, the court below correctly began its analysis by confirming that Buckeye had a Constitutionally protectable property interest. *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627, 641 (6th Cir. 2001); *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1986) (explaining that the first step is to identify the property or liberty interest entitled to due process protections). NAHB agrees with the Sixth Circuit's conclusions that Buckeye had a property interest and that Buckeye "presented sufficient evidence to create a genuine issue of material

fact as to whether the" City violated Buckeye's due process rights. *Buckeye*, 263 F.3d at 644.

However, NAHB disagrees with the analysis that the Sixth Circuit used to determine that Buckeye possessed a property interest. In its analysis, the court below focused on the facts that the City Council had approved Buckeye's site plan and that a tangible benefit of an approved plan is a building permit. *Buckeye*, 263 F.3d at 642. According to the court, Buckeye had a property interest in the building permit. This analysis, however, was not necessary. Buckeye's property right comes from its ownership of the land and its right to use it, not from a property right in a permit.

ARGUMENT

I. The Right to Use One's Property Is a Right That the Constitution Protects.

When a claimant argues that the government has substantively deprived him of his property without due process of law, the claimant must initially prove that he has a property right that the Constitution protects. *Brock, 481* U.S. at 260. Here, the right at issue is the right to own and use property—which the Constitution protects from irrational and arbitrary government action.

A. The Right to Own Property Inheres With Every Citizen.

i. The Right to Own Property Is Fundamental to Our Form of Government.

The Colonial leaders of the United States believed that "the protection of private property was crucial to the preservation of freedom," and that "property rights antedated political liberty." James W. Ely, Jr., *The Guardian of Every Other Right, A Constitutional History of Property Rights* 28 (Oxford University Press 2d ed. 1998); *See generally* Bernard H. Siegan, *Property Rights* 50-52 (Transaction Publishers 2001); *Holden v. Hardy*, 169 U.S. 366, 389 (1897) (providing that there are certain "fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State."). It was also understood that the function of government was to secure property rights. Ely, *supra*, at 32. It therefore follows that if society establishes government to protect property rights, then those rights

must be held by the people prior to the formation of government. Hence, the right to hold property is not created by governments, but in the United States, it inheres in all Americans.

In pre-Constitutional America, most states followed the English common law as the basis for their jurisprudence and "the views of William Blackstone influenced American law long after the break with England." Ely, *supra*, at 32; *See Alden v. Maine*, 527 U.S. 706, 715 (1999) (explaining that Blackstone's "works constituted the preeminent authority on English law for the founding generation."). Blackstone wrote that individuals have certain "absolute" rights, which are rights that belong to individuals "merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." J.W. Ehrlich, *Ehrlich's Blackstone* 42 (Greenwood Press 1959). "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." *Id.* at 51.

The early courts of the United States also understood that the right to own property existed before the formation of government. This is evidenced by their references to "fundamental" and "natural" rights. For example, the Supreme Court of Ohio explained:

> The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself . . .. The right of private property being, therefore, an *original right*, which it was one of the primary and most

> sacred objects of government to secure and protect . . .. The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, and prohibiting the enactment of any law impairing the obligations of contracts, were evidently designed to protect the right of private property as one of the primary and original objects of civil society . . ..

Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 632 (Ohio 1853) (emphasis in original). Similarly, this Court has provided "it has now become the fundamental law of this country that life, liberty, and property (which include "the pursuit of happiness") are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation." *Bartmeyer v. Iowa*, 85 U.S. 129, 136 (1873); *See also Ogden v. Saunders*, 25 U.S. 213, 319 (1827) (Johnson, J., dissenting) ("Admitting it, then, to be true, that, in general, men derive the right of private property, and of contracting engagements, from the principles of natural, universal law; admitting that these rights are, in the general, not derived from, or created by society, but are brought into it; and that no express, declaratory, municipal law, be necessary for their creation or recognition; yet, it is equally true, that these rights, and the obligations resulting from them, are subject to be regulated, modified, and, sometimes, absolutely restrained, by the positive enactions of municipal law."); *Henry v. Dubuque & Pac. R.R. Co.*, 10 Iowa 540, 543-44 (Iowa 1860) ("The plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property against any claim or demand . . .. To be thus protected and thus secure in the possession of his property is a right inalienable, a right which a written

constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy.").

No one would suggest that a state could constitutionally pass a statute that made it unlawful for citizens to own private property. *See Holden*, 169 U.S. at 391 (1897) (explaining, in an analysis of the due process clause, that a state prohibition against acquiring property would be unlawful and that it would be illegal to "deprive any class of persons of the general power to acquire property . . ."). This is because the right to own property is not a right that government grants. In the United States, it is a fundamental right that existed prior to the formation of the either the state or federal governments.

ii. This Court Has Recognized That Owning Property Is Privilege.

This Court has also acknowledged that the government does not grant the right to own property but that the right inheres in all citizens pursuant to Article IV of the Constitution. U.S. Const. art. IV, §2. The Court has often cited *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). *See e.g. Blake v. McClung*, 172 U.S. 239 (1898); *United States v. Wheeler*, 254 U.S. 281 (1920); *Supreme Court of New Hamshire v. Piper*, 470 U.S. 274 (1985). In *Corfield*, Justice Washington, in interpreting Article IV of the Constitution, explained that certain "privileges and immunities" are "fundamental," "belong . . . to the citizens of all free governments," and "have at all times been enjoyed by the citizens of the several states which compose [the] Union from the time of their becoming free, independent and sovereign." Among

these are "the right to acquire and possess property of every kind" and "to take, hold and dispose of [real and personal] property." *Corfield*, 6 F. Cas. at 551; *See Saenz v. Roe*, 526 U.S. 489, 501 n14 (1999) (quoting *Corfield* to advance the proposition that the right travel is a fundamental right guaranteed by the privileges and immunities clause.)

Similarly, in *Ward v. Maryland*, 79 U.S. 418 (1870), the state of Maryland found Mr. Ward in violation of a state law that made it unlawful to sell goods in Maryland without first obtaining a license. Mr. Ward claimed that the law violated the privileges and immunities clause of the Constitution. *Id.* at 425. This Court explained that it would not attempt to define the words "privileges and immunities," but that the terms unmistakably protect the right of a citizen of a state to "acquire personal property" and to "take and hold real estate." *Id.* at 430.[2]

Therefore, this Court has clarified that one of the privileges of being a citizen of a state is the right to

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[2] Likewise, in *Oyama v. California*, 332 U.S. 633 (1948), this Court addressed a challenge to California's Alien Land Law as applied to a minor citizen whose guardian was a Japanese alien. The case presented a conflict "between the State's right to formulate a policy of landholding . . . and the right of American citizens to own land anywhere in the United States." In addressing the conflict, the Court interpreted 42 U.S.C §1982, which provides that: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." It concluded that 42 U.S.C §1982 is a federal statute giving "**all** citizens the right take and hold real property" and that the Fourteenth Amendment vindicated this right. *Id.* at 640 (emphasis added). Finally, the court held that the right to hold property right may not be subordinated due to a citizen's father's country of origin. *Id.* at 647.

acquire, take, hold, possess, or in other words own, real and personal property.

In the case at bar, Buckeye had the fundamental right to own property and it exercised this right when it purchased the real property in question. *Buckeye*, 263 F.3d at 630.

B. The Right to Use Property is Inherent in Ownership.

As explained above, the Constitution protects one's right to own property. Moreover, intrinsic in ownership, is the right to use the property. In *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) the Federal Government seized Mr. Good's home because it had been used in furtherance of a drug felony in violation of federal law.[3] The Government seized the property without prior notice to Mr. Good and without an adversarial hearing. *Id.* at 47. Mr. Good claimed that the Government deprived him of his property without due process in violation of the Fifth Amendment.[4] The Court noted that there could be no dispute that the seizure "deprived him of property interests protected by the Due Process Clause." Furthermore, the Court explained that Mr. Good had valuable rights of ownership and that these rights include "the right of sale, the right of occupancy, **the right to unrestricted use** and enjoyment, and the right to receive rents." *Id.* at 54 (emphasis added).

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[3] Mr. Good was incarcerated at the time of seizure.

[4] Mr. Good made his claim under the Fifth Amendment as opposed to the Fourteenth Amendment because he challenged the actions of the federal government, not a state government.

Furthermore, in *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945), a Fifth Amendment "takings" case, this court explained:

> It is conceivable that the [term property] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

Thus, in the United States, property is not merely an object over which the owner may legally assert dominion. It is a group of rights that are inherent in the owner's relationship with the physical thing and one of those is the right to use the property. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it."); *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) ("property rights in the land include the right to **use**, lease and dispose of it for lawful purposes . . . and the Constitution protects these *essential* attributes of property . . .") (emphasis added) (citations omitted); *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983) ("A property right is not bare title, but the right of exclusive use and enjoyment."); *Appeal of Perrin*, 156 A. 305, 306 (Pa. 1931) ("The right of an owner to devote his property to any legitimate use is within the protection of the federal Constitution."); *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921) ("Therefore a law which

forbids the use of certain kind of property, strips it of an essential attribute and in actual result proscribes its ownership.").[5]

C. State Law Restricts Property Rights, It Does Not Create Them.

In the United States "sovereign powers are delegated to the agencies of government, sovereignty itself [, however,] remains with the people . . .. And the law is the definition and limitation of power." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Thus, rights are not granted by government, they inhere in the people and the people have allowed the government to restrict those rights.

This concept was recognized in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) where a property owner wished to expand his beachfront home. In *Nollan*, however, the California Coastal Commission would not issue a building permit, unless Mr. Nollan would grant it an easement along his beachfront property. This Court found that the Commission had taken Mr. Nollan's property in violation of the Fifth Amendment.[6] In doing so, the Court explained that "the right to build on

[5] Courts that declare that state law create the right to use one's property fail to recognize that the right to use property is inherent in the ownership of property. Land use laws, such as zoning laws, restrict the use of property; they do not create the right to use property. If zoning created the right to use property, landowners in cities such as Houston, TX (where there is no zoning) would not have the right to use their property. This is counter-intuitive.

[6] Though the Court did not directly analyze the issue, it must have determined that Mr. Nollan had a property interest due to his ownership of his home.

one's property-even though its exercise can be subjected to legitimate permitting requirements-cannot remotely be described as a 'governmental benefit.'" *Id.* at 833 n.2. In other words, the right to use one's property is not a right that is granted by the state. *See also Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (explaining that "zoning regulations [interfere] with the general rights of the land owner by restricting the character of his use . . ..")

Therefore, as provided above, the right to own property is central to our form of government and inheres to every citizen. In addition, as this Court has explained, inherent in ownership, is the right to use one's property, though states may regulate and restrict the way in which a property owner uses his or her property. Thus, when courts analyze whether a substantive due process claimant has a property interest in real or personal property, the courts should focus on the claimant's relationship with the property, not on any state created restrictions to the owners use.

The court below correctly concluded that Buckeye possessed a property right that the Constitution protects. However, it incorrectly focused on whether Buckeye was entitled to a building permit because the City had approved its site plan. Buckeye had a right to use its property because it owned the property. The Sixth Circuit should have acknowledged that Buckeye's right to use its property is protected by the due process clause.

II. The "Entitlement Approach" Has Been Incorrectly Applied to Cases Where The Government Regulates Tangible Property.

Many courts, including the Sixth Circuit, have used the "entitlement approach" to determine whether a due process claimant has a protectable property right. This analysis, may be applicable to benefits granted by a state. However, it is not applicable when the claimant holds real or personal property because such a claimant has an inherent right to use its property.

A. The *Roth* and *Perry* "Entitlement Approach."

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), a state university dismissed a professor after one year of employment. The professor claimed that the university violated his due process rights by punishing him for asserting his right to free speech, and by not providing him with reasons for his dismissal and a hearing to respond. In determining whether the professor had a property interest in his employment that was protected by the Constitution this Court explained "to have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it." *Id.* at 577. Furthermore, the Court provided that the Constitution does not create property interests. "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings . . .." *Id.* at 577.

In a companion case, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), which was based on similar facts, the Court reiterated that one has a property interest in a benefit if

"there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . .."

Taken together, these cases have spawned the "entitlement approach" to determine whether a person has a property right protected by the Constitution and many Circuits have incorrectly used this approach in land regulation cases. Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash Univ. Journal of Law & Policy 61, 78, 97 (2000) ("The constitutional basis for [the entitlement] rule is problematic and courts should abolish it."); Kenneth B. Bley, Tina R. Axelrad, *In Search for Constitutionally Protected "Property" In Land-Use Law*, 29 Urb. Law. 251, 265-68 (1997). These Circuits "look to the landowners 'degree of entitlement' to whatever land use permit the owner is seeking . . .." Bley and Axelrad, *supra*, at 262.

The court below improperly used the "entitlement approach" in determining that Buckeye had a property interest in its approved site plan. It explained that "an abstract need or unilateral expectation does not suffice to create a property interest; rather, a person must 'have a legitimate claim of entitlement.'" *Buckeye*, 263 at 641 (citations omitted). Moreover, the City argued that since site plan approval was discretionary, Buckeye did not have a claim of entitlement. The Sixth Circuit, however, found that the City had approved the site plan and that Buckeye's "property interest was securely vested upon the City's" approval. *Id.* at 643.

As we explain below, the Sixth Circuit incorrectly applied the "entitlement approach" in this matter. While NAHB

agrees that there are sufficient facts that warrant further development of Buckeye's due process claim, we disagree that the government's site plan approval somehow created the right at issue. Buckeye's constitutionally protected right to use its property derives from its ownership of the property.

B. *Roth* and *Perry* Were Meant to Expand Property Rights, Not Contract Them.

The *Roth* Court explained that it is "clear that property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." This statement establishes a baseline of those things that comprise a property interest, namely the ownership of real estate, chattels or money. Furthermore, the statement makes clear that there are property rights that exist beyond the baseline—such as "the security of interests that a person has already acquired in specific benefits." *Roth*, 408 U.S. at 576. The Court further explained that welfare benefits and continued public employment are examples of these expanded property rights. Thus, the *Roth* Court clarified that the law recognizes property rights beyond the ownership of real property, chattels or money and that the baseline interest is always sufficient to trigger due process protection.

Similarly, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 999 (1984) Monsanto claimed that the government unlawfully took trade secrets in violation of the Fifth Amendment. As with the due process analysis, the Court begins a "takings" analysis by determining whether the complainant has a property interest. *Id.* at 1000. The Court began its analysis by analogizing trade secrets to real property and explaining that they have "many of the

same characteristics . . .." *Id.* at 1003. Furthermore, the Court explained that the "perception of trade secrets as property is consonant with a notion of 'property' that extends beyond land and tangible goods and includes products of an individual's 'labour and invention.'" *Id.* at 1003 (citations omitted). Thus, in holding that Monsanto's trade secrets were "property," the Court again recognized that "land and tangible goods" are the baseline of those things that comprise property.

In addition to an interest in the land, Courts that apply the "entitlement approach" to land regulation cases require landowners to prove entitlement to a permit or approval. This extra requirement, which focuses on the state imposed restriction, leads to less property interests being recognized, not more. This is contrary to the *Roth* Court's desire to expand the set of protectable property interests. It also follows that because fewer courts recognize a protectable property interest, fewer courts will move to the next step and analyze whether the government arbitrarily and capriciously deprived the owner of his rights.

Even courts that use the "entitlement approach" have recognized this problem. For example, in the leading case[7] of *RRI Realty Corp. v. Village of South Hampton*, 870 F.2d 911 (2nd Cir. 1989), the property owner sought a building permit to expand a home. After the Village denied the landowner a permit, the landowner brought suit claiming that the Village violated its due process rights by arbitrarily and capriciously denying the permit. Using the "entitlement approach," the Second Circuit held that the plaintiff did not have a property interest because of the discretion that the Village review board had to issue the

[7] Mandelker, *supra*, at 79.

permit. Thus, the court never analyzed whether the Village acted arbitrarily.

Nevertheless, the *RRI C*ourt also questioned why courts have applied the entitlement approach to land use cases. It recognized that focusing on the discretion of the regulator "permits the threshold rejection of some federal due process claims, without awaiting exploration of whether the regulator acted so arbitrarily as to offend substantive due process . . .." *Id.* at 918.

C. The Lower Courts Fail to Look Beyond State Law When Determining One's Property Rights.

In many of the "entitlement approach" cases, the Circuit Courts restate this Court's declaration in *Roth*, that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source **such as** state law—rules or understandings . . .." *Roth*, 408 U.S. 577 (emphasis added); *Accord Perry*, 408 U.S. at 601 (explaining that property interests are secured by "'existing rules or understandings.'") (citing *Roth*). However, state courts often abbreviate the statement, asserting that state law defines property rights. *See e.g. Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210-13 (10th Cir. 2000) (focusing only on "state and local law"); *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124 (2nd Cir. 1998) (looking only to New York zoning law to determine whether plaintiffs had a legitimate claim of entitlement); *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992) (providing that landowner's property rights were "created and defined by the Baltimore city

charter and the Planning Commission's subdivision regulations promulgated thereunder.").

By focusing only on state law, these courts ignore the words "such as" and they fail to analyze whether there are other more basic understandings that define property rights, such as those presented in Part I. *Supra* pp. 5-11.

III. In a Due Process Challenge, a Minority of Circuits Correctly Focus on The Claimant's Relationship to The Property In Question.

The Third and Seventh Circuits have correctly focused on the claimant's relationship to the property to determine whether a property interest exists in a due process case. For example, in *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3rd Cir. 1995), a landowner brought a substantive due process action claiming that a township's zoning board violated his rights when it denied him a variance. The Third Circuit explained that to have an actionable substantive due process claim, the claimant must possess a property interest worthy of constitutional protection. *Id.* at 598. Ownership, according to the court, "is a property interest worthy of substantive due process protection." *Id.* at 600. Furthermore, the Third Circuit provided that it did not believe that this Court's jurisprudence mandated the use of the entitlement approach. *Id.* at 600 n.9.

The Seventh Circuit has also documented a similar approach. In *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989), property owners claimed that two city employees violated their due process rights with respect to a tavern license and certificate of occupancy. The Seventh Circuit explained that when a landowner challenges a zoning

regulation on due process grounds, "the property interest in such a case is apparent—it is the ownership interest in the land itself . . .." *Id.* at 556.

Thus, though these Circuits acknowledge that a state may regulate the use of property, they correctly focus their due process analysis on the claimant's relationship to the property in question, not on the restrictions imposed by the state. And these courts have correctly concluded that ownership is a property interest that the Constitution protects.

CONCLUSION

The U.S. Constitution does not allow a state to deprive a citizen of his property without due process of law. Every citizen of the United States has the right to own property. When one owns property, the owner has an inherent right to use the property. Thus, in due process cases where the claimant owns real property, courts need not analyze the owner's degree of entitlement to use the property. In these cases, courts should recognize that the owner has a property interest in the use of the property and determine whether the state arbitrarily and capriciously deprived the owner of said use.

For all of the foregoing reasons, this Court should uphold the Sixth Circuit's conclusion, but clarify that Buckeye's protected property interest arises from its right to use the land at issue, not because the municipality approved a land use plan.

DATED: November 14, 2002

Respectfully submitted,

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(17)

Supreme Court, U.S.
FILED
NOV 30 2002
OFFICE OF THE CLERK

No. 01-1269

IN THE
Supreme Court of the United States

CITY OF CUYAHOGA FALLS, *et al.*,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF TEXAS AS AMICI CURIAE SUPPORTING RESPONDENTS

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STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") and its independent local affiliates, the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, the Washington Lawyers' Committee for Civil Rights and Urban Affairs and the Lawyers' Committee for Civil Rights Under Law of Texas, submit this brief as *amici curiae*, with the consent of the parties,[1] in support of Respondents' argument that the Sixth Circuit properly recognized a claim for intentional discrimination in violation of the Fourteenth Amendment and the Fair Housing Act ("FHA"), and in support of the availability of disparate impact claims under the FHA, though none is pursued by Respondents in this case.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Toward that end, the Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before this Court involving claims for discrimination under the Fourteenth Amendment and the FHA. *See, e.g., Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, its staff, or its counsel made a monetary contribution for the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Taken in the light most favorable to Plaintiffs-Respondents ("Buckeye"), the facts of this case establish a straightforward instance of intentional discrimination by a municipality, violating the Fourteenth Amendment of the U.S. Constitution and the FHA, 42 U.S.C. § 3601 *et seq.* *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("the court must draw all reasonable inferences in favor of the nonmoving party"); *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) ("Summary judgment . . . is appropriate only where there is no genuine issue of material fact"; government "motivation is itself a factual question").

The record contains substantial evidence that the City of Cuyahoga Falls, Ohio (the "City") engaged in discrimination in violation of the Equal Protection Clause and the FHA when it denied building permits to Buckeye under the approved site plan for its tax credit housing development. A city may properly be held liable when, in bowing to discriminatory public pressure, its leaders ignore or improperly apply the law. In concluding that the record contained evidence the City acted with discriminatory animus, the court below properly considered evidence of the nature of the public opposition to Buckeye's project. As demonstrated in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), and numerous other cases, courts may broadly consider such evidence in determining whether government action is impermissibly motivated.

This is not a First Amendment case. Consideration of evidence bearing on municipal intent simply does not implicate any such concerns. The City's potential liability in this case stems not from citizen speech, but from its municipal action in response to that activity; not from the filing of a referendum petition, but from the City's decision to withhold permits from Buckeye. No citizen is

subject to liability for speaking in opposition to the project or pursuing a referendum.

The Court of Appeals properly found that the evidence could support a claim for intentional discrimination. Here, City officials, acting in response to citizens motivated in part by animus to African Americans and families with children, delayed approval of Buckeye's site plan in a determined effort to find any legal pretext to halt the project. After proposing and facilitating a referendum drive to challenge the approved project, City officials then wrongly used the referendum filing to prohibit the issuance of building permits to Buckeye. Refusing to issue the permits on the basis of the referendum challenging the site plan approval - an administrative action - violated the Ohio Constitution. Refusing to issue the permits to serve its own or its citizens' discriminatory opposition violated the Equal Protection Clause and the FHA. City officials improperly withheld permits from Buckeye and may properly be held liable for that decision.

While the disparate impact claim in this case is moot (and the City has waived its challenge by not raising it below), the Court of Appeals properly recognized that the FHA, like its counterpart Title VII, countenances disparate impact claims. This ruling is consistent with the language and legislative history of the FHA, as well as this Court's reading of virtually identical language in Title VII. The Court has no basis on which to address this issue here, but if it does, it should not disturb this settled interpretation, unanimously adopted by the Courts of Appeals and accepted by Congress.

STATEMENT OF THE CASE

Buckeye developed a proposal for subsidized multifamily housing in the City that met or exceeded all applicable zoning requirements. Notwithstanding the absence of any legitimate zoning basis to block the project, City officials acted in response to and in

concert with community opposition motivated by an animus to families and African Americans to delay and ultimately deny Buckeye the building permits needed to proceed with its project.

The City's Planning Commission required unprecedented changes to Buckeye's site plan, including the creation of a barrier between the project and the surrounding community. *See* Sixth Circuit Joint Appendix ("JA") at 152-54, 966-67. Prior to a Commission meeting to review the plan, a City Councilman urged residents to express their concerns at the meeting. *See id.* at 484-87. The proposal met vigorous community opposition, in contrast to a more dense condominium project approved several years earlier. *See* U.S. Supreme Court Joint Appendix ("App.") at 43a. Comments at the meeting made both overt and veiled reference to the discriminatory animus underlying the opposition. *See, e.g.*, App. at 44a ("Are your little kids going to shut up right at sunset?"); JA at 479 (concern that the project would "potentially have a lot of children"); App. at 40a ("They know what kind of element is going to move in there, just like you have on Prange Drive," referring to the only area of the City with a substantial black population).

Notwithstanding its recognition that there was no technical or legal basis on which to reject Planning Commission approval of the project, the City Council held two public meetings to discuss the project and further delayed voting on it. *See* Docket Entry Record ("R.") 40, Ex. G, at 50; JA at 967 (Mayor's request that vote be delayed to "buy time"). Again, the opposition expressed to the project suggested discriminatory animus. *See, e.g.*, App. at 139a ("We have got our ghetto.... This project is already being called Pleasant Ghetto."). Racial animus was also indicated in the threatening comments made to Buckeye's representative. *See* Transcript of Preliminary Injunction Hearing ("Tr.") at 37.

In further response to such opposition, members of the City Council and the Mayor sought in vain for any legal pretext to block the project. For example, at a public meeting one Councilwoman

explained that she and others had engaged in extensive efforts, "[j]ust to get any legal shred that we could hang onto so that we could reject this project." App. at 150a. City Councillors requested that the City Law Director identify any legal basis to block the project. *See, e.g., id.* at 140a-141a. Despite their recognition that blocking Buckeye's proposal would result in liability for the City, *see id.* at 119a-120a (Mayor acknowledging advice that the City would likely lose a lawsuit if it blocked the project); *id.* at 147a-148a (Councilman acknowledging same), the Mayor and others urged the Council to reject the project and force Buckeye into expensive litigation in the hopes it could not afford to do so. *See id.* at 156a-157a. Eventually, after delaying votes on the site plan, the City Council approved (by divided vote) the ordinance authorizing the project. The ordinance was "pocket approved" only because the Mayor did not veto it.

Having delayed the approval process, City officials then facilitated and participated in a referendum movement - the "legal shred" the City manufactured to legitimize its refusal to issue building permits to Buckeye. The idea to use a referendum, in fact, was initially raised by the City Law Director at a City Council meeting, *see id.* at 173a, though one had never been used to challenge an apartment project in the City. Using the time the delays bought to complete the referendum drive, the Mayor met on several occasions with other leaders of the drive. The Mayor's continuing participation in the drive was indicated by his request to the City Law Department to identify the exact number of citizen signatures required to submit the referendum petition. *See* JA at 979.

Before the referendum petition was even filed and without any legal basis, the Mayor instructed the City Engineer, through his supervisor, the Director of Public Service, to withhold permits from Buckeye. *See* R. 34, Ex. A; Tr. at 193-94. The Law Director also jumped the gun, similarly advising the Engineer to withhold permits in a brief three-sentence memorandum which concluded that "[a]s

a result of the filing of these [referendum] petitions, *the sufficiency of which is currently being ascertained* by the Clerk, [the ordinance authorizing the Buckeye project] does not take effect." App. at 55a (emphasis added).

Contrary to those actions, the referendum petition should have been rejected as inappropriately challenging administrative action. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 697 N.E.2d 181, 186 (Ohio 1998). The City's decision to withhold permits was thus without legal basis.

Such evidence, viewed in the light most favorable to Buckeye, clearly is sufficient to support a finding of intentional discrimination by City officials. The City repeatedly used its powers and processes to delay approval of Buckeye's site plan to find any "legal shred" to oppose the project, then seized upon a wrongful interpretation of its City Charter to refuse to issue building permits to Buckeye. Because there is evidence that the City did so with invidious motives, bowing to public animus, it may properly be held liable under the Equal Protection Clause and the FHA.

ARGUMENT

I. TO ASSESS MOTIVES BEHIND MUNICIPAL ACTION, COURTS MAY PROPERLY CONSIDER EVIDENCE OF THE DISCRIMINATORY NATURE OF PUBLIC OPPOSITION.

Under the long-standing precedent of this Court, trial courts considering claims of intentional discrimination under the Equal Protection Clause and the FHA legitimately consider the motivations of citizens supporting referenda as relevant evidence of whether municipal actions giving effect to such citizen activity are motivated by invidious purposes. There is nothing in the procedural peculiarities of this case - or the First Amendment - that warrants

deviation from the analysis this Court set forth in *Arlington Heights*.

A. Evidence of public animus has always been probative of municipal discriminatory purpose under the *Arlington Heights* test.

In considering whether a municipality has violated the Equal Protection Clause or the FHA, a court must inquire, as the Sixth Circuit did here, "whether invidious discriminatory purpose was a motivating factor" in the defendant's actions. *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 634 (6th Cir. 2001); *see also Arlington Heights*, 429 U.S. at 265-66. Establishing a violation of the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes," *Arlington Heights*, 429 U.S. at 265, since it can rarely be said that a single consideration was the dominant or primary purpose in legislative action.

Rather, making such an assessment of municipal intent "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266; *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (same). In *Arlington Heights*, the Court identified several non-exclusive factors probative of discriminatory purpose: (1) the disproportionate racial impact of the official actions; (2) the historical background of the action; (3) the specific sequence of events leading up to the challenged action; (4) departures from normal procedures; (5) substantive departures from the factors normally considered by decision-makers; and (6) the legislative or administrative history. *Arlington Heights*, 429 U.S. at 266-68. Applying this framework, it is permissible to inquire "whether the public opposition to the housing project was animated by racial bias and whether City officials improperly gave effect to that racial bias by allowing the

fate of the project to be decided by referendum." *Buckeye*, 263 F.3d at 634.

Such consideration is clearly contemplated by precedent. *Arlington Heights* and subsequent decisions of this Court properly consider evidence of citizen or voter intent in assessing whether even facially-neutral referenda embody racially discriminatory intent. In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 484-85 (1982), for example, the Court noted that "when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations." Looking at, *inter alia*, statements by sponsors of the initiative, the Court found that "despite its facial neutrality there is little doubt that the [challenged citizen-approved] initiative was effectively drawn for racial purposes." *Id.* at 471. Similarly, in *Crawford v. Board of Education*, 458 U.S. 527, 543-45 (1982), the Court considered evidence of voter intent before concluding that a popularly-approved constitutional amendment was not motivated by a discriminatory purpose.

In evaluating whether a popularly-adopted state constitutional amendment contained a distinction based on race, the Court in *James v. Valtierra*, 402 U.S. 137 (1971), also did not limit its examination to the text of the amendment, but rather concluded that "the *record* here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." *Id.* at 141 (emphasis added); *see also Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (court "properly undertook" examination of constitutionality of popularly-approved constitutional amendment with consideration of its "immediate objective").

This Court has looked regularly to evidence of discriminatory intent in striking down various forms of law-making, such as constitutional conventions and legislative redistricting. As a general rule, "if a neutral law has a disproportionately adverse effect upon

a racial minority, it is unconstitutional under the Equal Protection Clause . . . if that impact can be traced to a discriminatory purpose." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979). Thus, in *Hunter v. Underwood*, 471 U.S. 222, 227-32 (1985), the Court looked to statements at a state constitutional convention as evidence of discriminatory intent to invalidate a facially neutral provision restricting the franchise.

Likewise, in assessing a redistricting plan in *Miller v. Johnson*, 515 U.S. 900, 917-20 (1995), the Court looked at evidence that the legislature was predominantly motivated by race in striking down its creation of a voting district. It concluded that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Id.* at 913. Noting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court stated that "it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation." *Miller*, 515 U.S. at 913; *see also Hunt*, 526 U.S. at 553-54 (directing district court to consider evidence as to whether legislature had impermissible motivation in districting plan); *Bush v. Vera*, 517 U.S. 952, 959 (1996) (O'Connor, J.) (adopting district court's determination that race was the predominant motivating factor in districting plan); *Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (looking to "racial block voting" as evidence in concluding that at-large voting system "has been maintained for the purpose of denying blacks equal access"). In other areas, the Court has also emphasized the importance of invidious legislative intent. *See Griffin v. County Sch. Bd.*, 377 U.S. 218, 223 n.6 (1964) (looking to statement of school board abandoning public schools as establishing discriminatory government purpose); *Feeney*, 442 U.S. at 276 (dispositive question is whether discriminatory purpose shaped legislation giving civil service preference to veterans).

Following *Arlington Heights* and these cases, several Courts of Appeals have similarly considered evidence of public animus in determining whether a municipality violated the Equal Protection Clause by taking action to prevent the development of low-income housing. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1066-67 (4th Cir. 1982) (trial court properly considered evidence of public racial animus, including "statements by citizens," "'racial innuendo' and 'racial pressure,'" and statements by leaders of public opposition indicating that "opposition to the project was primarily racial"); *see also id.* at 1066 ("There can be no doubt that the defendants knew that a significant portion of the public opposition was racially inspired, and their public acts were a direct response to that opposition.").[2]

This broad inquiry into evidence of intent is necessary because straightforward evidence of discriminatory intent is "rare," *Arlington Heights*, 429 U.S. at 266, since "[m]unicipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because

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[2] *See also Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997) ("Of course, private citizens' motivations and government officials' knowledge of these motivations may be quite relevant to the ultimate issue of the government officials' purposes."); *United States v. City of Birmingham*, 727 F.2d 560, 564 (6th Cir. 1984) ("the views expressed by a significant number of opponents of [the proposed low-income housing]" were properly considered in assessing whether the defendant municipality's actions were racially motivated); *United States v. City of Parma*, 661 F.2d 562, 568 (6th Cir. 1981) (implicitly approving inquiry into intent of voters by including voter-approved facially-neutral ordinances among the municipal actions found to be "motivated by a racially discriminatory and exclusionary intent"); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) (approving consideration of evidence of racial animus displayed by public supporters of a petition opposing proposed low-income housing in concluding that racial motivation rendered city liable despite "no evidence of racial prejudice on the part of any city official").

of their desire to discriminate against a racial minority." *Clarkton*, 682 F.2d at 1064. Moreover, "[p]atterns of discrimination as conspicuous as [in *Yick Wo* and *Gomillion*] are rare, and are not a necessary predicate to a violation of the Equal Protection Clause." *Miller*, 515 U.S. at 913-14; *see also Hunt*, 526 U.S. at 553 ("Outright admissions of impermissible racial motivation are infrequent"); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) ("If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection.").

Nor is an inquiry into popular motivations rare. In other contexts, considering evidence of voter intent behind popularly-enacted petitions and referenda is commonplace. When faced with questions of legislative intent, courts will look to evidence of voter intent in construing ambiguous portions of popularly-enacted initiatives and referenda. For example, "[m]aterial in an official voters' pamphlet may be considered by the court in determining the purpose of legislation adopted by the initiative process. This is because the 'collective intent' of the people becomes the object of the court's search where a law is enacted in this manner." *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C. 1989) (citation omitted). Likewise, other courts routinely approve examining evidence of voter intent.[3]

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[3] *See, e.g., Estate of Turner v. Wash. State Dep't of Revenue*, 724 P.2d 1013, 1015 (Wash. 1986) (in construing popularly enactment, the court should "consider the collective intent of the people as it would ordinarily consider 'legislative intent'"); *Thomas v. Bailey*, 595 P.2d 1, 4 n.15 (Alaska 1979) ("In construing a constitutional provision which has been ratified by the voters, the court also can look to evidence on the meaning the voters probably placed on the provision.") (citation omitted); *Winter v. Royal Oak City Manager*, 26 N.W.2d 893, 896 (Mich. 1947) (in construing voter-enacted local charter amendment, the court must "ascertain and give effect to the

B. Conducting the *Arlington Heights* inquiry into the motivations behind the instant referendum petition poses no First Amendment concerns where, as here, no speaker is being silenced or held liable for speech.

Notwithstanding these applications of the "motivating factor" test to government action, the City and *amicus* United States suggest that "an inquiry into the motives of those who supported a referendum threatens to chill important First Amendment activities." United States Br. at 9. This argument misconceives this case: this is a case against a municipality for discriminatory action, not a lawsuit against private parties who supported the referendum.

The City's First Amendment contentions do not withstand serious scrutiny, for no speaker is being prevented from, or punished for, speaking. Instead, the Sixth Circuit decision here contemplates municipal liability for withholding building permits, not citizen liability for advocating or filing a referendum. The City's invocation of First Amendment concerns depends upon its erroneous premise that the potential for liability chills speech by "punish[ing] citizens for pursuing these most fundamental of constitutional rights." Pet. Br. at 10. But the imposition of liability upon a *municipality* for government action does not fall upon any of the *citizen* speakers.[4] No one is punished for filing a referendum petition, nor for speaking in support of it.[5] Simply put, this is not a

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intent of the electorate with due regard to the circumstances and the purpose sought to be accomplished").

[4] This case is therefore distinguishable from *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (federal investigation of private citizens for FHA violations based on petitioning activities runs afoul of First Amendment).

[5] Given the absence of claims against any citizen-speaker, the United States' analogy to other contexts where the protected speech activities are

First Amendment case: liability attaches only to the municipal action in withholding permits from Buckeye. The First Amendment protects political expression, but does not insulate government action undertaken with an unlawful purpose from constitutional scrutiny.

To the extent citizen speech is considered here, it only serves as permissible evidence of discriminatory intent, or motive, on the part of City actors. This Court has already made clear that consideration of such discriminatory motives, even where laws impose direct penalties on the speakers, does not offend the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."). In *Mitchell*, the Court likened the First Amendment challenge to the criminal penalty-enhancement statute

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only unlawful where they are "a sham" (the *Noerr-Pennington* antitrust and defamation contexts) are particularly inapt. *See* United States Br. at 13-15. In those contexts, the alleged *speakers* are exposed to potential liability. By contrast, here, the citizens are not defendants.

Moreover, a *Noerr-Pennington*-type "sham" standard would be incoherent in the petition context because of the requirement that a "sham" activity be "objectively baseless." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). By contrast, a petition could never be "objectively baseless," since even referenda that are unconstitutional, unwise or illogical may be approved by voters - and will often have alternate justifications. *See generally* David Franklin, Comment, *Civil Rights vs. Civil Liberties? The Legality of State Court Lawsuits under the Fair Housing Act*, 63 U. Chi. L. Rev. 1607, 1625-28 (1996) (sham standard inappropriate for FHA cases).

Furthermore, discovering evidence to prove such a "sham" theory would exacerbate - not ameliorate - First Amendment concerns, since the same (or more extensive) discovery regarding the motives of referendum proponents would be required to prove that the movement was a "sham." This higher standard would not cure that problem, but only increase (to unwieldy levels) the burden on civil rights plaintiffs to prove motive.

to "federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge." *Id.* at 487. In one such case, the Court rejected a First Amendment challenge to an application of Title VII, noting that "[invidious] private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)); *see Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (stating same); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (plurality opinion) (allowing evidentiary use of defendant's speech in evaluating Title VII discrimination claim).

The First Amendment does not prohibit considering public statements as evidence of discriminatory intent to establish a municipality's liability for its actions. Though the City and the United States attempt to conjure up an untenable parade of horribles that would stem from a finding of liability, the Sixth Circuit's decision creates no such problems. It does not force city officials to cross-examine citizens, United States Br. at 19, or impose liability on a municipality "if only one voter . . . express[es] racial bias." Pet. Br. at 20. Instead, the Court of Appeals decision simply - and properly - countenances that, in proving discriminatory intent, Buckeye may introduce evidence of public statements.

Moreover, the standards proposed by the City and *amicus* United States would open the Equal Protection Clause to relatively facile modes of evasion. Under the City's proposed standard, since the motives of referendum supporters could never be considered, intentionally and openly discriminatory referenda would not be unconstitutional so long as care in drafting rendered them not "facially" discriminatory. For example, citizens could hypothetically propose a referendum that barred construction of multi-family housing each time a developer proposed to construct subsidized

housing. Since the referendum could be supported by numerous non-discriminatory rationales, *e.g.*, budget concerns for public works or schools, it could always survive the proposed "sham" test. In sum, the standards proposed by the City and *amicus* United States would eviscerate the Equal Protection Clause so long as citizens intending to discriminate put even a minimal amount of forethought into disguising their motives in the text of the provision.

Thus, the referendum exception to *Arlington Heights* that the City finds in *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986), is misguided. *See* Pet. Br. at 20 ("[A]bsent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context.") (quoting *Arthur*, 782 F.2d at 574). There is no reason to hold municipal action taken in response to popular initiatives to a more forgiving standard, creating two distinct tests under the Fourteenth Amendment - one applicable to one type of government action by elected legislatures or executives and another to government action in response to citizen referenda. As this Court has noted, government action through referendum is subject to the same judicial scrutiny as other official action, for "[t]he sovereignty of the people is itself subject to . . . constitutional limitations." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).[6] In the equal protection context, history and the jurisprudence of this Court counsel against greater constitutional deference to the direct initiatives of a citizen majority. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

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[6] Similarly, those cases where the Court has inquired into legislative motive suggest that neither the First Amendment nor the respect traditionally accorded legislative speech and debate can insulate unlawfully-motivated statutes from constitutional scrutiny. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 917-20 (1995), and cases cited *supra*.

II. THERE IS EVIDENCE SUFFICIENT TO SUPPORT PLAINTIFF'S CLAIM FOR INTENTIONAL DISCRIMINATION.

In applying the standards for intentional discrimination under the FHA and the Equal Protection Clause to the facts of this case, the question before the Court is whether the City's actions denying permits were motivated by discriminatory animus.[7] Specifically, Buckeye is challenging not the referendum itself (or any citizen activity in support of the referendum), but rather the City's decision to refuse to issue permits based on its application of referendum procedures - giving effect to a referendum that the Ohio Supreme Court found constitutionally impermissible.

The City and its *amici*, however, ignore the City's decision to refuse to issue the building permits and attempt to make the City a mere passive player in the case, arguing erroneously that the City "is facing liability simply because its citizens made use of the referendum process." *Amicus* International Municipal Lawyers Association Br. at 2. Not so. The municipal action for which the City would be liable is not the citizen's filing of the referendum, but rather the City's withholding of properly approved building permits in response to the petition filing, notwithstanding that doing so violated the Ohio Constitution, the U.S. Constitution and federal law. The City's erroneous and unconstitutional decision to invoke the City Charter referendum provisions cannot shield it from liability.

Crucially, the City's decision was contrary to state constitutional law - a wrongful application of the City Charter referendum provisions invoked for the first time to the building permit context. *See Buckeye*, 263 F.3d at 635. The directions from the Mayor

[7] The question whether the City's enforcement of the referendum as approved would be unlawful is not presented in this case as the referendum was invalidated under the Ohio Constitution by the Ohio Supreme Court.

(through the Director of Public Service) and the City Law Director instructing the City Engineer to withhold permits from Buckeye ignored Ohio's "well-established case law .... [that] clearly limits referendum and initiative powers to questions that are legislative in nature." *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 697 N.E.2d 181, 184 (Ohio 1998). As the Ohio Supreme Court concluded, the referendum on which the City Law Director determined to obstruct Buckeye's permit was impermissible under the Ohio Constitution. *See id.* at 186. The Ohio Supreme Court's holding that the City could not conduct a referendum on the petition belies the City's erroneous claim that it "had no lawful authority to do other than it did." Pet. Br. at 15.

The decision to withhold permits embodied in those instructions, made either prior to the referendum filing or before its sufficiency had been ascertained, was not only premised on an improper interpretation of Ohio law. It also ignored the supremacy of federal and constitutional law over the referendum provisions of the City Charter. That decision, standing state and federal constitutional law on its head in response to pressure from citizens who made their discriminatory animus clear at several City Council meetings, unquestionably merits liability under the Equal Protection Clause and the FHA.

Should Buckeye prove at trial that the City withheld the permits through a series of actions motivated by discriminatory intent, neither the City's legally erroneous claim that it was "required" to withhold permits under the City Charter, nor its contention that the City merely responded to potentially invidious motives of its citizens pre-empt municipal liability.

First, it is no defense for the City to claim (incorrectly) that its action to stay the permits was required by state law, for "state action in violation of the [Fourteenth] Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a [state actor] in the absence of

statute." *Shelley v. Kraemer*, 334 U.S. 1, 16 (1948); *see also id.* at 20 ("[State action] is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy."). Thus, the City's argument that it cannot be held liable because the City Law Director concluded that "the filing of the referendum prevented the site plan ordinance from taking effect," Pet. Br. at 4, must be rejected: "state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971). To hold otherwise would excuse deliberately narrow and incorrect readings of state law which omit consideration of other state, federal and Constitutional law - and allow municipal officials to escape liability whenever they could concoct any "legal shred" upon which to justify intentionally discriminatory action. In this case, the City's novel application of the City Charter's referendum provision was not even permitted under the Ohio Constitution, and ignored that the effect it gave the petition violated federal law and the U.S. Constitution.

Moreover, in the civil rights context, the Court has made clear that a municipality's claimed good faith will not insulate it from liability for giving effect to the private discrimination of any individual citizens. For example, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), a municipal authority could be held liable for permitting a lessee of municipal property to use it in a discriminatory manner, notwithstanding that the municipality did not endorse that use. *See id.* at 725 ("[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."); *Norwood v. Harrison*, 413 U.S. 455, 466 (1973) ("[G]ood intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty."); *see also Gautreaux v. Romney*, 448 F.2d

731, 738 (7th Cir. 1971) ("[A]lleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools."). As in *Shelley*, the fact that a violation of the Constitution resulted from the application of state law did not immunize the state actor from liability. *See Shelley*, 334 U.S. at 17 ("It has been held that the action of state courts in enforcing a substantive common-law rule . . . may result in the denial of rights guaranteed by the Fourteenth Amendment.").

The other justification proffered by the City - that the action was taken at the behest of private individuals, the referendum petitioners - does not prevent the City from being found liable for violating the Equal Protection Clause. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also Shelley*, 334 U.S. at 20 ("[T]he [Fourteenth] Amendment [is not] ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by [private actors]."). Instead, as in *Shelley*, this is a case "in which the State[] ha[s] made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of [their] property rights." *Id.* at 19. Such unconstitutional uses of municipal power cannot stand, for "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Id.* at 22.[8]

In this case, the City may be held liable for its knowing decision to withhold permits from Buckeye in response to a citizen referendum filing which it facilitated and supported through repeated

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[8] As one resident noted at a City Council meeting, "sometimes leadership calls people to do the right thing[,] not the expedient thing. It calls for leaders to make principled decisions rather than political ones. To act courageously when there may be great risk." App. at 143a.

delays in the approval process and whose discriminatory animus was made plain at City Council meetings. Neither the fact that the City invented a "legal shred" that ultimately proved impermissible under the Ohio Constitution, nor the claim that it merely indulged citizen animus, can shield the City from liability under the Equal Protection Clause or the FHA.

III. THE FAIR HOUSING ACT PERMITS A CAUSE OF ACTION FOR DISPARATE IMPACT.

The City also challenges the Sixth Circuit's conclusion that Buckeye may pursue a disparate impact claim under the FHA. As a preliminary matter, this question has been mooted by Buckeye's withdrawal of any claim based on disparate impact. *See* Resp. Br. at 32; *see also* United States Br. at 10 n.1. Furthermore, because the City failed to raise this argument before either the District Court or the Court of Appeals, it has waived its challenge to this reading of the FHA. Nonetheless, the misstatements made by the City and its *amici* regarding disparate impact require a response. First, as a general matter, the language and legislative history of Title VIII, like the virtually identical provisions of Title VII, permit claims without proof of discriminatory intent. Second, such disparate impact claims are appropriate in the context presented here.

A. The Fair Housing Act's language, read *in pari materia* with Title VII, indicates that Congress did not require proof of a defendant's discriminatory intent to state a cause of action.

The language of the FHA does not limit violations to cases where complainants can prove the "intent" of defendants. Instead, Title VIII provides that "it shall be unlawful [t]o . . . otherwise make unavailable or deny[] a dwelling to any person because of race,

color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The City erroneously contends that the "because of" language means that defendants must have acted with intentional discrimination - *i.e.*, targeting groups as a result of racial (or other) animus. But the plain language of the statute nowhere refers to potential defendants or their motives, and thus no limitation of the statute to "intentional" cases is contemplated. Rather, the phrase "because of" may just as easily be read to mean that the dwelling is unavailable to a person "on account of the fact that" they are members of a specific race (or other protected category). *See* Pet. Br. at 23 (citing dictionary definition of "because"). This is the precise situation captured by "discriminatory effects" claims, where the fact of a person's being in the disparately-impacted category renders the dwelling "otherwise unavailable" to them. *See* Robert Schwemm, *Housing Discrimination: Law and Litigation* § 10:4, at 10-29 to 10-30 (2002).

This reading of the statutory language is further supported by reading Title VIII *in pari materia* with Title VII, which is appropriate since they are "part of a larger statutory framework of civil rights laws which should be interpreted in a coordinated manner." Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 Harv. C.R.-C.L. L. Rev. 128, 159 (1976). Indeed, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court unanimously held that the language in Title VII - language almost identical to the "because of" language in the FHA - encompassed claims for discrimination notwithstanding a defendant's lack of discriminatory intent. *See id.* at 430, 426 n.1 (citing 42 U.S.C. § 2000e-2 (1971)). The use of the "because of" language in Title VII did not require claimants to prove discriminatory intent since "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs*, 401 U.S. at 432 (emphasis in original). Thus, "practices, procedures, or tests neutral on their face, and even

neutral in terms of intent, cannot be maintained" if they work discriminatory effects. *Id.* at 430. Since *Griggs*, "[t]his Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988).[9]

B. The legislative history of the Fair Housing Act indicates a broad intention to end practices supporting residential segregation.

In addition, the legislative history of the FHA is replete with indications that Congress intended it to prohibit not merely overt, intentional discrimination but also all actions and practices that impeded, purposefully or not, the goals of the statute: facilitating minority residence in suburban areas, and promoting an integrated and stable society. *See* 114 Cong. Rec. 2274-79 (1968) (remarks of Senator Mondale); *id.* at 2279-81 (remarks of Senator Brooke); *see also* 42 U.S.C. § 3601 (broadly stating goal "to provide, within constitutional limitations, for fair housing throughout the United States"). This Court has similarly recognized that the statute should be construed broadly to achieve these goals. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (one goal of Title VIII is to achieve "truly integrated and balanced living patterns") (quoting Senator Mondale, 114 Cong. Rec. 3422). Moreover, as one commentator summarized,

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[9] *See also, e.g., Washington v. Davis*, 426 U.S. 229, 247 (1976) (reiterating that "discriminatory purpose need not be proved" in claims under Title VII). This result confirms, contrary to the implications of *amicus* Pacific Legal Foundation, *see* Br. at 16-18, that the Court's decisions requiring discriminatory intent to establish Fourteenth Amendment violations are not at odds with its conclusion that statutes like Title VII appropriately encompass disparate impact claims.

> Congress appeared to recognize the importance of private and public actions which perpetuate discrimination and segregation but are neither explicitly nor blatantly discriminatory. Congressmen spoke of the significance of Title VIII in eliminating effects produced by past discrimination, government thoughtlessness, and subtle economic and social pressures.

Comment, 11 Harv. C.R.-C.L. L. Rev. at 144 (citations omitted); *see also, e.g.*, 114 Cong. Rec. 2699 (Constitutionality Memorandum) (decrying "[l]ocal ordinances with the same effect" as explicit discrimination as demonstrating that "the problem of government-practiced discrimination in housing is not entirely of the past"); 114 Cong. Rec. 228 (remarks of Senator Brooke). Senator Mondale, a leading proponent of the legislation, noted that it would "undo the effects" of past discrimination. 114 Cong. Rec. 2699. Thus, addressing facially neutral ordinances with the effect of excluding minorities without explicit discrimination was among the goals contemplated by Congress during consideration of the bill.[10]

Perhaps most tellingly, the Senate rejected an amendment that would have required proof of intentional discrimination in certain circumstances. *See* 114 Cong. Rec. 5221-22; *see also Resident*

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[10] Senator Mondale made clear that such discriminatory government activity was among the problems to which the FHA responded:

> Negroes who live in slum ghettos, however, have been unable to move to suburban communities and other exclusively white areas. In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing . . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels.

114 Cong. Rec. 2277 (1968) (quoting U.S. Comm'n on Civil Rights, Report 60 (1967)).

Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977) (noting rejection of amendment); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir.) (noting same), *aff'd per curiam*, 488 U.S. 15 (1988).

The City's citation of a portion of the legislative history out of context is simply a *non sequitur*. *See* Pet. Br. at 23-24. Senator Magnuson's hypothetical sale by a homeowner of a single home is not a scenario which would engender discussion of discriminatory effects claims relating to broader municipal action or policies; his question was directed at whether a public offering was required. Senator Mondale's response therefore cannot be read to imply any belief that the statute imposed an intent requirement. Similarly, *amicus* Pacific Legal Foundation ("PLF") cites several comments in the legislative history indicating that the FHA would address intentional discrimination. Of course, a major impetus behind the bill was that such overt, intentional discrimination was still legal. But none of the statements cited indicates a Congressional intention to *limit* the FHA to such cases. *See* PLF Br. at 5-6.[11]

C. The Courts of Appeals have uniformly concluded that Title VIII, like Title VII, includes claims based on discriminatory effects, and Congress has rejected efforts to disturb that consistent judicial interpretation.

The Courts of Appeals have reached the uniform consensus that Title VIII, sharing virtually identical language with Title VII, does

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[11] PLF's broad contention that the FHA "was not even intended to apply to land use regulation," PLF Br. at 8, ignores a vast body of cases, including those approved by the Court, that have applied the Act to zoning decisions. *See generally, e.g., Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (affirming decision that zoning restriction violated Act).

not require proof of discriminatory intent.[12] For example, in *Arlington Heights*, the Supreme Court, after dismissing Equal Protection claims absent proof of discriminatory intent in that case, remanded to the Seventh Circuit for consideration of whether conduct having discriminatory effects nonetheless violated the FHA. *See Arlington Heights*, 429 U.S. at 271; *Rizzo*, 564 F.2d at 147 ("In remanding, rather than directing the dismissal of the *Arlington Heights* litigation, the Court at least implied that considerations other than those necessary for proof of equal protection violations must govern Title VIII claims.").[13]

Noting *Griggs*, the Seventh Circuit on remand found no "indicat[ion that] Congress intended that proof of discriminatory intent was unnecessary under [Title VII] but necessary under [Title VIII]." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights* ("*Arlington Heights II*"), 558 F.2d 1283, 1289 (7th Cir. 1977). Further, given the broad Congressional intent to promote integrated residential housing, and "the need to construe [Title VIII] expansively in order to implement that goal, [the Court of Appeals] decline[d] to take a narrow view of the phrase 'because of race,'" *id.* at 1289, instead concluding that violations "can be established

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[12] The City misleadingly suggests that at least one Court of Appeals has required a finding of discriminatory intent. *See* Pet. Br. at 21 (citing *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989)). *Asbury* did not consider whether a disparate impact theory was viable under Title VIII, since the plaintiff there apparently alleged only intentional discrimination. Rather, when the Tenth Circuit directly considered the issue, it definitively concluded that the FHA includes disparate impact claims. *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1252 (10th Cir. 1995).

[13] As in *Arlington Heights*, this Court gave its tacit approval to discriminatory effects claims in its *per curiam* opinion approving the Second Circuit's approval of such a claim in *Huntington*, 488 U.S. at 18 ("Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown").

by a showing of discriminatory effect without a showing of discriminatory intent." *Id.* at 1290. Since requiring proof of intent often would be "impossible to satisfy," inevitably frustrating the purposes of Title VIII, the Court of Appeals concluded that "[w]e cannot agree that Congress in enacting the [FHA] intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly." *Id.*[14]

Other Courts of Appeals similarly concluded that "discriminatory effect alone will, if proved, establish a Title VIII *prima facie* case." *Rizzo*, 564 F.2d at 148. As in *Arlington*

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[14] In arguing that claims under Title VIII require proof of discriminatory intent, *amicus* PLF makes several analogies to different statutory schemes, but never addresses the body of cases that have read Title VIII *in pari materia* with Title VII. If anything, PLF's observation that Congress has limited the use of disparate impact analysis in certain situations covered by Title VII, *see* PLF Br. at 14-15, only reinforces the conclusion that it was Congress' purpose that both statutes permit disparate impact claims. As it has done in limited cases under Title VII, Congress is capable of creating exceptions to that general rule should it desire to do so.

PLF's analogies to statutes other than Title VII are harder to justify or understand. PLF's comparison to the Voting Rights Act's preclearance procedures has no analogue in the FHA, since the Department of Justice does not review and approve real estate-related decisions. *See* PLF Br. at 8. PLF does not even attempt to explain what relevance its description of the history of administrative regulations under Title VI has to claims under Title VIII, *see* PLF Br. at 9-14; since the Court of Appeals decisions finding disparate impact claims under Title VIII do not depend on any similar regulations, PLF's discussion is simply irrelevant. PLF's reference to the Equal Pay Act's lack of an impact standard is incoherent, in that it concedes that the act was "designed differently" from Title VII, and, by extension, Title VIII, which shares the same language. *See* PLF Br. at 19. Finally, PLF notes that this Court has not decided whether disparate impact liability is applicable to the Age Discrimination in Employment Act. *See* PLF Brief at 18-19. If this Court's reservation of questions has such weight, then under PLF's reasoning the *per curiam* opinion in *Huntington* is dispositive here.

Heights II, the *Rizzo* Court observed that the language and broad policy goals of the Act, as well as the reading given Title VII, supported an expansive application of Title VIII to include disparate impact cases. *Id.* at 147-48. By 1988, every Court of Appeals to consider the question joined in this conclusion.[15]

Against this background of consistent judicial interpretation, Congress considered and passed the 1988 Fair Housing Amendments Act. The Amendments Act did not change the substantive elements required to prove a violation, and instead rejected a proposal to add an intent requirement. *See* Robert Schwemm, *Housing Discrimination: Law and Litigation*, § 10:4, at 10-35 to 10-36 (2002). As Senator Kennedy summarized, Congress was well aware that nine of the then-twelve federal Courts of Appeals had all concluded "that a showing of a discriminatory effect may be used to establish a violation," and "Congress accepted this consistent judicial interpretation." 134 Cong. Rec. S 12449 (1988).

Since 1988, moreover, the First and Tenth Circuit Courts of Appeals have joined in this consensus, and other Courts of Appeals have reiterated their previous positions. *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1250-52 (10th Cir. 1995); *see also* Schwemm, § 10:4, at 10-37 n.41 (collecting cases).

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[15] *See, e.g., Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-38 (2d Cir. 1979) (noting analogy to *Griggs* reading of Title VII adopted in *Arlington Heights II*); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986-87 (4th Cir. 1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *United States v. Mitchell*, 580 F.2d 789, 791-92 (5th Cir. 1978); *Arthur v. City of Toledo*, 782 F.2d 565, 574-77 (6th Cir. 1986); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) ("[e]ffect, and not motivation, is the touchstone"); *Halet v. Wend Inv. Co.*, 672 F.2d 1035, 1311 (9th Cir. 1982).

D. Discriminatory effect claims under the Fair Housing Act are properly stated in this context.

There is no reason to suggest that the FHA's disparate impact claim does not encompass the circumstances here. The City argues this Court should limit such claims in the referendum context, because "the interest in upholding referendum rights far outweighs the statutory interests of a developer." Pet. Br. at 26.[16]

There is no basis for such a limitation. First, there is no such trade-off because this case does not involve "referendum rights": the City faces liability for withholding permits, not for the citizens' filing a referendum. But, as noted *supra*, even assuming "referendum rights" (if by that the City means any alleged entitlement to a "stay" in filing a referendum petition held impermissible under the Ohio Constitution) are at issue, the argument here is specious. There is no exception for statutes otherwise unconstitutional simply because they are popularly-enacted rather than legislatively or constitutionally conceived. Nor is there such an exception in the FHA, or any reason to believe that, as a categorical matter, "referendum rights" supplant the interests represented by the FHA -

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[16] The United States' contention that the disparate impact theory cannot apply to a case involving a single government decision, *see* Br. at 10 n.1, is simply mistaken. Numerous courts have applied the disparate impact theory to a single action by a government or private housing provider. The doctrine is not limited to challenges to general policies or rules; rather, a claim may be established by demonstrating that either "the action or rule challenged has discriminatory impact." *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 17 (1988). Thus, for example, in *Arlington Heights II*, a single municipal refusal to rezone property that had a discriminatory effect could violate the FHA. *See* 558 F.2d 1283, 1290 (7th Cir. 1977). To suggest that such decisions actually apply disparate impact to general policies rather than single decisions because the decisions affect many individuals does not tenably distinguish this case, where the City's decision impacted housing availability for a large number of families.

particularly given that it was enacted to protect the minority from discriminatory treatment by the majority.

In *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), which the City cites as refusing to extend the disparate impact approach to cases of racial steering, *see* Pet. Br. at 22, the court in fact expressly did not decide that question, choosing instead to limit its discussion to the facts of that case. *See id.* at 1533. Even there, the court recognized that the disparate impact rationale fits well in the municipal zoning context. There is no problem with applying disparate impact theories to such municipal decisions, since it is appropriate "to require a municipal government to consider the impact of its zoning decisions on the racial composition of the municipality." *Dwivedi*, 895 F.2d at 1533. Rather, it is precisely such municipal decisions - even those related to referenda - that are most apt for consideration under disparate impact theories.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals regarding the claim of intentional discrimination should be affirmed, and the judgment regarding the disparate impact claim should be vacated.

Respectfully submitted,

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November 20, 2002